Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

BENNY CHAN; VICTORIA CHAN, individually, and as husband and wife, a marital community; VICTORIA CHAN, as Guardian Ad Litem of SAMANTHA ALEXIS CHAN, ZACHARY ALEX CHAN, and AMANDA ELIZABETH CHAN, minor children,

Petitioners,

v.

SOCIETY EXPEDITIONS, INC., a Washington Corporation,

Respondent,

and

DISCOVERER, a West German Corporation, *Respondent*; HEIKO KLEIN, a West German citizen, *Defendant.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's holding in *Miles v. Apex Marine Corp.* (loss of society damages are not available in a general maritime action for the wrongful death of a seaman because Congress did not authorize such recovery in overlapping maritime wrongful death statutes) was intended to bar loss of society damages in all maritime personal injury actions, even where a cruise ship passenger is injured and no statutory cause of action applies.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

STATEMENT 2

A. Facts 2

B. Proceedings Below 3

REASONS FOR GRANTING THE PETITION 6

I. The Ninth Circuit's Conflicting Interpretations of Miles Reflect the Growing Confusion and Lack of Uniformity Regarding Maritime Remedies 7

II. The Decision of the Court of Appeals is Erroneous 17

III. The Question Presented Is Important 19

CONCLUSION 20

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

American Dredging Company, 1994 A.M.C. 2833 (S.D. Fla. 1994) 10

American Export Lines, Inc. v. Alvez, 446 U.S. 274 (1980) 7

Cantore v. Blue Lagoon Water Sports, Inc., 799 F. Supp. 1151 (S.D. Fla. 1992) 10

Carnival Cruise Lines v. Red Fox Industries, Inc., 813 F. Supp. 1185 (E.D. La. 1993) 15

Cater v. Placid Oil Co., 760 F. Supp. 568 (E.D. La. 1991) 16

Petition of Cleveland Tankers, Inc., 843 F. Supp. 1157 (E.D. Mich. 1994) 15

Davis v. Shipbuilding and Repair Co., Inc., 27 F.3d 426 (1994) 8

Earhart v. Chevron USA, Inc., 852 F. Supp. 515 (E.D. La. 1993) 15

Ellender v. John E. Graham & Co., 821 F. Supp. 1136 (E.D. La. 1992) 15

Emery v. Rock Island Boatworks, Inc., 847 F. Supp. 114 (C.D. Ill. 1994) 13

Ferrara v. Fukuoka Senpaqu K.K., 1991 A.M.C. 2249 (D.C. Mass. 1991) 16

Garner v. Dravo Basic Materials Co., 768 F. Supp. 192 (S.D. W.Va. 1991) 12

The Harrisburg, 119 U.S. 199 (1886) 18

Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950) 18

Hollie v. Consolidated Natural Gas Co., Inc., 1993 A.M.C. 2161 (E.D. La. 1993) 16

TABLE OF AUTHORITIES – Continued

Page

Kelly v. Panama Canal Com'n, 26 F.3d 597 (5th Cir. 1994) 9

Michel v. Total Transportation, Inc., 957 F.2d 186 (5th Cir. 1992) 4

Michigan Central R. Co. v. Vreeland, 227 U.S. 59 (1913) 4

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) ... *passim*

Miller v. American President Lines, Ltd., 989 F.2d 1450 (6th Cir. 1993), *cert. denied*, ___ U.S. ___, 126 L.Ed.2d 252, 114 S.Ct. 304 (1993) 12

Moragne v. States Marine Lines, 398 U.S. 375, 393 (1970) 18

In re Morehead Marine, 844 F. Supp. 1193 (S.D. Ohio 1994) 11, 12

Nichols v. Petroleum Helicopters, Inc., 17 F.3d 119 (5th Cir. 1994) 9

The Osceola, 189 U.S. 158 (1903) 18

Powers v. Bayliner Marine Corp., 855 F. Supp. 199 (W.D. Mich. 1994) 11

Randall v. Chevron U.S.A., Inc., 13 F.3d 888 (5th Cir. 1994) 9

Rebstock v. Sonat Offshore Drilling, 764 F. Supp. 75 (E.D. La. 1991) 14, 15

Schumacher v. Cooper, 850 F. Supp. 438 (D. S.C. 1994) 13

Sea-Land Services., Inc. v. Gaudet, 414 U.S. 573 (1974) 3, 5, 7, 8, 12, 18

TABLE OF AUTHORITIES – Continued

Page

Shield v. Bayliner Marine Corp., 822 F. Supp. 81 (D. Conn. 1993) 12

Sugden v. Puget Sound Tug & Barge Co., 796 F. Supp. 455 (W.D. Wash. 1992) 14, 15

Sutton v. Earles, 26 F.3d 903 (9th Cir. 1994) ... 7, 8, 9, 11

Turley v. Co-Mar Offshore Marine Corp., 766 F. Supp. 501 (E.D. La. 1991) 16

Verdin v. L&M Bo-Truc. Rental, 1992 A.M.C. 93 (E.D. La. 1991) 14, 15

Wahlstrom v. Kawasaki Heavy Industries, LTD., 4 F.3d 1085 (2nd Cir. 1993), *cert. denied*, ___ U.S. ___, 127 L.Ed.2d 380, 114 S.Ct. 1060 (1994) 10

STATUTES AND RULES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1333(1) 2

33 U.S.C. § 905(b) 16

46 U.S.C. app. § 688 (1988) – Jones Act 5

46 U.S.C. app. §§ 761-767 (1988) – Death on the High Seas Act 6

Fed. R. Civ. P. 54(b) 4

OTHER

W. Keeton, *Prosser and Keeton on the Law of Torts* (5th ed. 1984) 18

J. Sims, "The American Law of Maritime Injury and Death: An Historical Review," 55 *Tulane L. Rev.* 973 (1981) 18

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The initial opinion of the court of appeals (App., *infra*, 30-59) was amended (App., *infra*, 1-29) and is reported at ___ F.3d ___. The opinion of the district court (App., *infra*, 60-64) is unreported.

JURISDICTION

The court of appeals entered its judgment on October 14, 1994 (App., *infra*, 71-72). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Facts

On March 30, 1990, Petitioners Benny Chan, his wife Victoria, and their seven-year-old daughter, Samantha, embarked from Tahiti on a fifteen-day cruise aboard the cruise ship *World Discoverer*. On the second day of the cruise Mr. Chan and his daughter boarded one of the ship's inflatable Zodiac rafts, by which they were to be ferried with other passengers from the ship to a small island for sightseeing. The raft capsized during its approach to the island, and Mr. Chan and his daughter were thrown into the surf. Another passenger and the raft's pilot were fatally injured. Mr. Chan alleges, in part, that he suffered a serious brain injury in the capsizing.

B. Proceedings Below

On July 30, 1990, this lawsuit was filed in the district court for the Western District of Washington, which is the Chan family's residence as well as the forum specified by the ship's charterer, Society Expeditions, in the Chans' passenger tickets[1]. The basis for federal jurisdiction was the district court's original admiralty or maritime jurisdiction under 28 U.S.C. § 1333(1).

As later amended, the complaint named Benny and Victoria Chan and their three minor children as plaintiffs. In the amended complaint Victoria's damages were alleged to include "impairment of the marital relationship to include the loss of love, affection, companionship, support, society and consortium of her spouse." The three minor children's damages were alleged to include impairment of the parent-child relationship "to include the loss of the love, affection, guidance and support" of their father, Benny Chan.

The district court dismissed in a single sentence these "consortium" claims[2] in response to the defendants'

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[1] The Chans' contract of carriage specified under "PLACE OF SUIT" that "All disputes . . . shall be litigated . . . in the State of Washington, USA, to the exclusion of the courts of any other state or country."

[2] The terms "consortium" and "society" are used interchangeably by the lower courts in discussing whether non-pecuniary damages are recoverable in maritime actions. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585 (1974), defines "society" to include "love, affection, care, attention, companionship, comfort, and protection." Loss of consortium "encompasses" loss of society. *Id.* at 589. Pecuniary damages include loss of services and, when the beneficiary is a child, "the loss of

motion for partial summary judgment, stating in its minute order: "Damages for loss of society or consortium are not recoverable in a general maritime personal injury case. *Cf. Michael* [sic] *v. Total Transportation, Inc.*, 957 F. 2d 186, 191 (5th Cir. 1992) (spouse of Jones Act seaman could not recover damages for loss of society)."[3] App., *infra*, 62.

The United States Court of Appeals for the Ninth Circuit, to whom Petitioners appealed pursuant to 28 U.S.C. § 1291[4], affirmed dismissal of the claims for loss of society. While noting that *Michel v. Total Transportation, Inc.*, 957 F.2d 186 (5th Cir. 1992), relied upon by the district court, was not on point, the court of appeals decided that permitting damages for loss of society in this case would frustrate the goal of achieving "uniformity" among remedies within admiralty jurisdiction. App., *infra*, 20-23. In response to a motion for reconsideration, the court of appeals amended its opinion by distinguishing contrary Ninth Circuit authority on the

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care, counsel, training and education." *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 71 (1913).

[3] The district court also dismissed Mr. Chan's action against Society Expeditions, on the basis of state workers' compensation immunity, and all claims against Discoverer on jurisdictional grounds, and all claims against Heiko Klein because Mr. Klein was shielded from personal liability by his various corporate entities. No appeal was taken as to Mr. Klein's dismissal, and so he is not a respondent to this Petition.

[4] Because of the district court's various dismissals of parties and claims, only Samantha Chan's own personal injury action against Society Expeditions remained. The district court therefore certified the matter for interlocutory appeal pursuant to Fed.R.Civ.P. 54(b). App., *infra*, 67-68.

basis that Mr. Chan's injury occurred outside state territorial waters. App., *infra*, 21-22.

The appellate court's focus on uniformity among maritime remedies was premised upon its reading of *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), which involved a wrongful death action, commenced under both the Jones Act and general maritime law, for death of a seaman. At issue in *Miles* was whether damages for loss of society and lost future income were available in wrongful death actions under the judicially created general maritime law, even though Congress did not authorize these remedies in death actions under either the Jones Act or the Death on The High Seas Act. With reference to loss of society damages, this Court decided:

> It would be inconsistent with our place in the constitutional scheme were we to fashion more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence. We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman.

Id. at 32, 33. The intended effect of the Court's holding was stated precisely: "Today we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Id.*

The court of appeals acknowledged that Mr. Chan was not a seaman, and so the Jones Act, 46 U.S.C. app. § 688 (1988), does not apply. Mr. Chan was not a longshoreman injured in state territorial waters, and so *Sea-*

Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974), does not apply. Mr. Chan's injuries were not fatal, and so the Death on the High Seas Act, 46 U.S.C. app. §§ 761-767 (1988) ("DOHSA"), does not apply. The court of appeals nonetheless looked to the inapplicable statutory provisions of the Jones Act and DOHSA for guidance and decided the goal of uniformity in maritime cases would best be served by denying damages for loss of consortium and loss of society in this case. The court of appeals concluded:

> In *Miles*, the Supreme Court sought to develop a "uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law." *Miles*, 498 U.S. at 32. For these reasons we affirm the district court's dismissal of the dependent plaintiffs' loss of consortium claims.

App., *infra*, 22-23.

REASONS FOR GRANTING THE PETITION

Although the *Miles* decision is straightforward and precise in its holding, lower courts' various applications of *Miles* are in disarray. Dozens of post-*Miles* decisions, involving the general issue of whether non-pecuniary damages are recoverable in maritime personal injury or wrongful death actions, have resulted in conflicting, irreconcilable divergence. Although post-*Miles* confusion is not yet so pronounced in the circuit courts of appeal, the Ninth Circuit has permitted recovery of damages for loss of society to the nondependent parents of decedents killed within state territorial waters, but in this case

denied such recovery to the dependent family members of a cruise ship passenger injured outside territorial waters.

The goal of uniformity among maritime remedies, as articulated in *Miles*, is unquestionably important. This Court has also made clear, however, in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), and *American Export Lines, Inc. v. Alvez*, 446 U.S. 274 (1980), that recovery of non-pecuniary damages is an important remedy in maritime law. This case presents this Court with the opportunity to clarify to lower courts that achieving uniformity in remedies does not require the complete withdrawal of non-pecuniary damages in virtually all maritime cases.

The confusion among district courts is pronounced. Decisions split on the basis of whether an injury or death occurred inside or outside territorial waters; whether the defendant is an employer; whether the plaintiff is a non-seaman, or seaman, or longshore worker; whether a decedent's beneficiaries were dependent or nondependent at the time of death; and whether any maritime plaintiff can recover damages not available to the heirs of a seaman. It would seem that the issue of recoverable damages in a maritime action is such a fundamental matter that the resources of the courts and litigants will continue to be consumed by exploring and testing the limits of *Miles* until further direction by this Court.

I. The Ninth Circuit's Conflicting Interpretations of Miles Reflect the Growing Confusion and Lack of Uniformity Regarding Maritime Remedies.

In *Sutton v. Earles*, 26 F.3d 903, 914-917 (9th Cir. 1994), the court held that parents, whether dependent or not, of

decedents killed in a recreational boating accident can recover loss of society damages. The court distinguished *Miles*:

> It is true that DOHSA and the Jones Act would not permit an award of such non-pecuniary damages, but DOHSA does not apply because the death was not on the high seas (beyond the three-mile limit), and the Jones Act does not apply because the decedents were not seamen.

26 F.3d at 915.

In *Davis v. Shipbuilding and Repair Co., Inc.*, 27 F.3d 426 (1994), the estates of three crewmen, who drowned at sea without dependent heirs, sued the ship's builder for negligent design and construction. The estates filed a survival action for lost future income. The court held that the estates could not recover lost future earnings because neither the Jones Act nor DOHSA permits such damages, citing *Miles*. In connection with this holding, the court distinguished *Sutton*:

> We have recently held that survival claims for lost future earnings may be pursued in a case involving the death of a nonseaman in state territorial waters. *Sutton v. Earles*, 26 P.3d 903 (9th Cir. 1994). *We said this was appropriate "where there is no applicable federal wrongful death statute imposing a damage limitation." Id.* at 920.

27 F.3d at 430 (emphasis added).

The same panel that decided *Davis* decided this case. In *Chan* the panel could not distinguish *Sutton* on the basis of "no applicable federal wrongful death statute imposing a damage limitation," as it did in *Davis*, because

no statute applies to this case. Instead, the panel distinguished *Sutton* on the basis that Mr. Chan's injuries occurred outside state territorial waters: "We have also held that the beneficiaries of passengers killed or injured on *state territorial waters* can recover such damages." App., *infra*, 21-22 (emphasis original). Unlike DOHSA cases, however, which by definition can only arise outside the three-mile territorial limit, the reason for differentiating the damages available to the family of an injured cruise ship passenger, on the basis of where injury occurred, is not apparent.

No post-*Miles* decision has been found involving the injury or death of a cruise ship passenger. Of the dozen or so cases to date involving recreational boaters, however, *Kelly v. Panama Canal Com'n*, 26 F.3d 597 (5th Cir. 1994), probably stretches *Miles* the furthest and has resulted in the harshest result. *Kelly* involved the death of a sailor, whose mast struck hanging electrical wires. In a wrongful death suit filed on behalf of the spouse and minor child, the court of appeals vacated damage awards for loss of society, stating: "Because Captain Kelly was a non-seaman and was not a longshoreman killed in territorial waters, *Nichols*[5] requires us to conclude that [the spouse and child are] not entitled to recover non-pecuniary damages." *Id.* at 602.

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[5] *Nichols v. Petroleum Helicopters, Inc.*, 17 F.3d 119 (5th Cir. 1994), involved a wife's claim for consortium in connection with a longshore worker's injury action for damages sustained in a helicopter crash outside state territorial waters. *But see Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994) (spouse and children of deceased longshore worker can recover loss of society damages where death occurred within territorial waters).

Wahlstrom v. Kawasaki Heavy Industries, LTD., 4 F.3d 1085 (2nd Cir. 1993), *cert. denied*, ___ U.S. ___, 127 L.Ed. 2d 380, 114 S.Ct. 1060 (1994), involved a wrongful death action by the parents of a 17-year-old who was killed in a jet ski accident. Suit was commenced against the jet ski manufacturer in federal court, based on diversity of citizenship, but the manufacturer successfully argued that the case was governed by maritime law, because the accident occurred in a navigable river, and that maritime law barred any recovery. *Id.* at 1086. The court of appeals agreed the parents could not recover damages for loss of society, but emphasized the "nondependent" relationship between parents and child. The basis for the court's decision was *Miles*, stating in part: "In addition, in view of the special regard accorded by admiralty to seamen, it would be anomalous to expand the class of beneficiaries of nonseamen who may recover for loss of society in the aftermath of the Supreme Court's denial of any such recovery for the beneficiaries of seamen." *Id.* at 1092.

That *Wahlstrom* may nonetheless implicitly recognize loss of society damages where dependency can be shown finds support in two district court cases involving fatal recreational boating accidents. In *Cantore v. Blue Lagoon Water Sports, Inc.*, 799 F. Supp. 1151, 1155 (S.D. Fla. 1992), the court does not refer to *Wahlstrom* but discusses other case law and states: "As the foregoing case law demonstrates, general maritime law has moved toward a denial of recovery for loss of society where the survivors are not dependent on the decedent." In *American Dredging Company*, 1994 A.M.C. 2833, 2844 n.4 (S.D. Fla. 1994), the court notes "that *Wahlstrom* appears to recognize financial

dependency as the dividing line for recovery of loss of society damages."

The distinction in recovering non-pecuniary damages based on whether a decedent's heirs were, or were not, financially dependent on the decedent was rejected by the Ninth Circuit in *Sutton v. Earles, supra,* 26 F.3d at 915-916. In addition, in *Complaint of Nobles,* 842 F. Supp. 1430, 1434 n.8 (N.D. Fla. 1993), the district court termed the financial dependency distinction "strained" and refused to strike parents' claims for loss of society in connection with the boating death of their son.

In *Powers v. Bayliner Marine Corp.,* 855 F. Supp. 199, 202 (W.D. Mich. 1994) (sailboat capsized killing four occupants), the court cites *Wahlstrom* as authority for the statement, "loss of society damages are recoverable under general maritime law where there is no statute that would preclude the same, but only, as the parties here agree, by dependent survivors." The court states,

> The uniformity explicitly restored [in *Miles*] is thus limited to the wrongful death claims of seamen. Further, the extent of the uniformity is defined by the Jones Act, which purports to govern only as between seamen and their employers. Here, none of the plaintiffs is a seaman, and no claim is made against a seaman's employer. As important as the *Miles* decision is in some respects, it simply is inapposite here.

Id. at 201.

In re Morehead Marine, 844 F. Supp. 1193 (S.D. Ohio 1994) (pleasure boat collided with barge killing two occupants), is particularly interesting because its conclusions, that non-pecuniary damages, loss of society and lost

future income are recoverable, are based on the underlying reasoning of *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974). *Gaudet* had previously been described as being in "a kind of legal limbo, limited to its facts, inapplicable on its facts yet not overruled." *Id.* at 1197 n.6, quoting *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1459 (6th Cir. 1993), *cert. denied*, ___ U.S. ___, 126 L.Ed.2d 252, 114 S.Ct. 304 (1993). The *Morehead* court, however, disagreed that the rationale of *Gaudet* has become meaningless:

> [W]e also conclude that this is precisely a case – and perhaps the only type of case – where *Gaudet*'s reasoning is wholly applicable. In this case, as it was for longshoremen at the time of the *Gaudet* decision, Congress has not spoken on the matter before the Court, and thus, the reasoning in *Gaudet* is entirely applicable to the case at bar.

844 F. Supp. at 1197 n.6.

Two remaining death cases involving recreational boating accidents are pertinent, even though the non-pecuniary damages sought were lost future income rather than loss of society. Each decision applied *Miles*, but the courts rendered opposite results. *Shield v. Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993), held that general maritime law does not permit such recovery. *Garner v. Dravo Basic Materials Co.*, 768 F. Supp. 192 (S.D. W.Va. 1991), held that lost future earnings are recoverable in a maritime action, because neither the Jones Act nor DOHSA applied, and because "A tortfeasor should bear the total cost of the victim's death, which does include the loss of future income." *Id.* at 195.

Two district court cases have been found that consider the measure of damages available in maritime actions involving recreational boating *injuries*, as opposed to deaths. Each holds that damages for consortium or society are recoverable under general maritime law.

Emery v. Rock Island Boatworks, Inc., 847 F. Supp. 114 (C.D. Ill. 1994), involved a boat passenger's injuries from falling eight feet through an open "scuttle hole" located in a passenger walkway. The court viewed the issue of whether the passenger's husband could recover loss of society damages as whether it should "adopt the scope of statutory remedies to situations where the statute [either DOHSA or the Jones Act] was not intended to be applied." *Id.* at 118. The court interpreted *Miles* as standing for the proposition that general maritime law "cannot supply more expansive damages in cases where either the DOHSA or the Jones Act apply." *Id.* The court concluded that where a plaintiff has no cause of action under either statute, the concern for uniformity does not exist, and therefore loss of society damages can be recovered in a general maritime action. *Id.*

Schumacher v. Cooper, 850 F. Supp. 438 (D. S.C. 1994) (swimmer struck by pleasure boat), also recognized a spouse's right to recover loss of consortium damages under general maritime law. The court explained its rationale as follows:

> Unlike the factual situation in *Miles*, the matter before this Court has not been statutorily addressed by Congress. This personal injury negligence claim by a non-seaman does not come under the almost strict liability protection afforded by the Jones Act to seamen or by

> DOHSA to anyone killed on the high seas. Since Plaintiff is not entitled to the benefits offered by these various statutory enactments, it follows that Plaintiff is not restricted by the limitations on damages that were clarified in *Miles*.

Id. at 454.

A further area of confusion and conflicting decisions involves the issue of whether loss of society damages are available in a seaman's action against a non-Jones Act employer. In *Rebstock v. Sonat Offshore Drilling*, 764 F. Supp. 75 (E.D. La. 1991) (injured seaman's claim against third parties), the court explained the *Miles* holding as follows: "The Court's holding was intended to ensure that a Jones Act seaman asserting a claim under the Jones Act and the doctrine of unseaworthiness against his employer did not recover more than Congress intended when it established the Jones Act." *Id.* at 75. The court reasoned that because the seaman had not asserted a Jones Act case, nor could he, against a non-employer, loss of consortium damages were recoverable. The court noted that to rule otherwise would create an inconsistency between seamen and longshoremen, because spouses of longshoremen are permitted to recover loss of consortium damages against third parties. *Id.* at 76. The same result was reached in *Verdin v. L&M Bo-Truc. Rental*, 1992 A.M.C. 93 (E.D. La. 1991), citing *Rebstock*.

In *Sugden v. Puget Sound Tug & Barge Co.*, 796 F. Supp. 455 (W.D. Wash. 1992) (death of Jones Act seaman), the court noted that the plaintiff was seeking non-pecuniary damages only from a non-employer under general maritime law. The court reasoned that because it was "beyond dispute that a seaman has no cause of action

under the Jones Act against a party other than his or her employer," the decedent husband was, in effect, not a Jones Act seaman for purposes of the suit against the third party. *Id.* at 457. The court concluded that *Miles* simply did not apply in such a case and permitted the claims for non-pecuniary damages to go forward. Also, in *Petition of Cleveland Tankers, Inc.*, 843 F. Supp. 1157 (E.D. Mich. 1994) (death of Jones Act seaman), the court explained:

> In the present case, Congress has not created a statutory remedy for seamen against non-employers in cases like the one currently before this Court. Accordingly, this Court's ruling that loss of consortium is recoverable would not be anomalous with *Miles*, given that no statute exists to preclude this type of damages.

Id. at 1160.

A number of district courts, however, have reached a result contrary to *Rebstock, Verdin, Sugden* and *Cleveland Tankers*. In *Carnival Cruise Lines v. Red Fox Industries, Inc.*, 813 F. Supp. 1185 (E.D. La. 1993), the court states:

> While acknowledging the authority that has been cited by the Respondents, this Court believes that the distinction between suits against a seaman's employer under the general maritime law and suits against a third party under the general maritime law is insignificant for purposes of *Miles* limitations on non-pecuniary damages.

Id. at 1187. Courts have also rejected the employer/third party distinction in *Earhart v. Chevron USA, Inc.*, 852 F. Supp. 515 (E.D. La. 1993); *Ellender v. John E. Graham & Co.*,

821 F. Supp. 1136 (E.D. La. 1992); *Turley v. Co-Mar Offshore Marine Corp.*, 766 F. Supp. 501 (E.D. La. 1991); and *Cater v. Placid Oil Co.*, 760 F. Supp. 568 (E.D. La. 1991).

The notion that non-pecuniary damages, including loss of society, are not available in actions by a seaman against a non-employer has been extended in some cases to bar the spouse of a longshoreman on the basis that it would be "anomalous" to allow the spouse of an injured longshoreman "to recover for loss of society under general maritime law when the spouse of an injured seaman would be refused such recovery." *Hollie v. Consolidated Natural Gas Co., Inc.*, 1993 A.M.C. 2161, 2162 (E.D. La. 1993).

In *Ferrara v. Fukuoka Senpaqu K.K.*, 1991 A.M.C. 2249 (D.C. Mass. 1991), however, the court noted that the Longshore and Harbor Workers' Compensation Act does not limit the damages recoverable to pecuniary losses, citing 33 U.S.C. § 905(b). The court concluded that the statutory basis for recovery of damages by a longshore worker is therefore quite different from that of a seaman, and permitted a claim for loss of consortium to be filed. *Id.* at 2252.

As these brief case summaries demonstrate, post-*Miles* decisions have split into two broad categories. One category of cases has limited the application of *Miles* to factual situations where overlapping, contrary statutory authority exists. The other category reads *Miles* as mandating a withdrawal of non-pecuniary damages to the limit of whatever a seaman can recover under the Jones Act. Less significant differences can be found among decisions in either of the two broad categories.

The central question, however, is the extent to which this Court intended to affect maritime remedies, in general, while achieving uniformity between statutory and judge-made remedies in cases concerning the wrongful death of a seaman.

II. The Decision of the Court of Appeals is Erroneous.

The court of appeals focused on the goal of uniformity, enunciated by this Court in the context of uniformity among remedies between statutory and judicially created actions for the wrongful death of a seaman, and concluded that nonseamen should be limited in remedy to whatever Congress provides for seamen. Surely, this Court in *Miles* did not mean to suggest that whenever Congress enacts legislation relative to a discrete class, all who fall outside that class should be similarly limited, or aided, by the inapplicable legislation. Conversely, no case suggests that a nonseaman may take advantage of the strict liability doctrine of unseaworthiness, even though the *Chan* court's expansive notion of uniformity would seem to support identical rights and remedies across the board of general maritime law.

Apparently underlying the *Chan* court's uniformity rationale was its concern that remedies available in injury suits should be no broader than remedies available in wrongful death suits. The court states it "makes no sense" to award loss of society or consortium damages to dependents of a passenger injured, as opposed to killed, at sea. App. *infra*, 22. Such a statement ignores the historical distinction between wrongful death and injury

actions, both in terms of whether such actions could even be brought at common law (maritime or not) and what damages have been available.

As this Court explained in *Moragne v. States Marine Lines*, 398 U.S. 375, 393 (1970), from the date of *The Harrisburg*, 119 U.S. 199 (1886), until 1920 when Congress enacted DOHSA and the Jones Act, there was no remedy for death on the high seas. Moreover, both at common law and in admiralty, remedies recoverable were specified in the statutes authorizing such suits. *See, Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 581-583 (1974). Thus, wrongful death actions, historically statutory, limited (or were interpreted by courts to limit) recoverable damages to "pecuniary" loss, excluding among other items damages for loss of society. *Id.* The fact that a claim for loss of consortium was not recognized until 30 years following enactment of DOHSA and the Jones Act also demonstrates how common law can evolve while a statutorily defined remedy remains relatively static. *See Hitaffer v. Argonne Co.*, 183 F.2d 811 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 852 (1950); W. Keeton, *Prosser and Keeton on the Law of Torts*, 931-932 (5th ed. 1984).

Contrary to the development of statute-based wrongful death actions, however, passengers on vessels "have been permitted to recover for injuries caused by a carrier's negligence throughout the history of American maritime law." J. Sims, "The American Law of Maritime Injury and Death: An Historical Review," 55 *Tulane L. Rev.* 973, 1003 (1981) (footnote omitted). Seamen were not accorded a cause of action for negligence until the Jones Act, because of *The Osceola*, 189 U.S. 158 (1903).

In view of the markedly different courses in the development of maritime wrongful death cases and injury cases, and in injury cases involving passengers and seamen, it does in fact "make sense" that remedies in all such cases are not uniform. What does not make sense is to deny the Chan family an important remedy for their own loss simply because Congress enacted statutes which have no application to this case.

III. The Question Presented Is Important.

The goal of uniformity in admiralty law, as it pertains to maritime remedies for personal injury and wrongful death, cannot foreseeably be achieved without further direction by this Court. In the relatively brief period since *Miles* was decided, dozens of cases have referred to it as a touchstone to reach widely varying and fundamentally irreconcilable results. It seems highly unlikely the lower courts will be able eventually to achieve consensus as to what *Miles* means, where one group of decisions views the case as simply resolving a conflict between overlapping statutory and judge-made law, and another group views the case as mandating a wholesale withdrawal of all remedies to whatever Congress envisioned in 1920. A clarification from this Court that non-pecuniary damages are recoverable in maritime cases, where no bar exists by reason of statute, would promote a more orderly development of decisional law and would ease considerably the burden placed on courts and litigants by the uncertainty of what remedies are available in maritime personal injury cases.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED this 11th day of January, 1995.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENNY CHAN; VICTORIA CHAN, individually and as husband and wife, a marital community; VICTORIA CHAN, as Guardian Ad Litem of SAMANTHA ALEXIS CHAN, ZACHARY ALEX CHAN, and AMANDA ELIZABETH CHAN, minor children, *Plaintiffs-Appellants,* v. SOCIETY EXPEDITIONS, INC., a Washington Corporation, *Defendant,* and DISCOVERER, a West German corporation; HEIKO KLEIN, a West German citizen, *Defendants-Appellees.*	No. 92-36868 D.C. No. CV-90-01055-TSZ ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted
February 1, 1994 – Seattle, Washington

Filed July 27, 1994
Amended October 14, 1994

Before: Alfred T. Goodwin, Mary M. Schroeder, and William A. Norris, Circuit Judges.

Opinion by Judge Goodwin

12675

SUMMARY

Workers' Compensation/Labor and Employment/Torts

The court of appeals affirmed a judgment in part, reversed in part, and vacated it in part. The court held that the exclusive remedy provision of the Washington state workers compensation act does not bar recovery in tort for personal injuries under the federal maritime law.

Appellants Benny and Victoria Chan booked passage for themselves and their seven-year-old daughter Samantha on the *World Discoverer*, a cruise ship operated by Discover Reederei, GmbH, a German corporation. Benny's employer, defendant Society Expeditions, Inc., a Washington corporation, chartered *World Discoverer*, Appellee Heiko Klein, a German citizen, was the sole shareholder, chairman, and president of Society Expeditions; he was also president and sole owner of Discoverer Reederei.

While ferrying from *Discoverer* to a Polynesian island, the Chans were thrown from a raft onto the surf. Benny and Samantha suffered serious injuries. At the time of the accident, Benny was a shore-based Society Expeditions employee.

The Chans filed an action against Society Expeditions, Discoverer Reederei and Klein. They alleged general maritime claims based on negligence and the doctrine of unseaworthiness. The complaint was served on Klein in Washington state individually and in his representative capacity. The district court denied Discoverer Reederei's summary judgment motion for want of service. The court went on to hold that because Benny had obtained Washington state workers compensation benefits for his injuries, the exclusive remedy provisions of the Washington state workers compensation act barred his recovery in tort for those injuries.

The court also ruled that it did not have personal jurisdiction over Discoverer Reederei and dismissed the Chans' case against it. In reaching this conclusion the court determined that even if Society Expeditions had authority to bind Discoverer Reederei to the Chans' passenger tickets (specifying Washington state law as governing "all disputes"), the forum selection clause on the tickets did not provide a basis for jurisdiction because it covered only venue. Lastly, the court held that the general maritime law precluded the Chans' claims for loss of consortium and emotional distress. The Chans appealed.

[1] The Washington Supreme Court has held that under the state workers compensation statute, a worker who accepts benefits can sue for his injuries under the federal maritime law. [2] Whether or not Benny is deemed to be an employee, he still had a general claim in admiralty for negligence.

[3] Under Rule 4 of the Federal Rules of Civil Procedure, foreign corporations may be served by delivering

a copy of the complaint on an officer, managing or general agent, or any agent authorized to receive service of process. [4] Rule 4 should be liberally construed to uphold service so long as a party receives sufficient notice of the complaint. [5] Discoverer Reederei offered no evidence that it was prejudiced by the failure of the summons to describe Klein in all of his capacities. The Chans complied with Rule 4 by serving an officer of Discoverer Reederei.

[6] Whether Discoverer Reederei used Society Expeditions as its general agent was a question of fact that was material to the personal jurisdiction issue. Remand was necessary for additional findings by the district court.

[7] The district court erred in concluding that the forum selection clause on the Chans' tickets could not confer personal jurisdiction over the parties who entered into it. Remand was required for the district court to decide whether Society Expeditions had the authority to bind Discoverer Reederei through the contract of carriage.

[8] None of the remedial schemes for recovery of society damages applied to Benny Chan. He was not a seaman, so the Jones Act did not apply. He was not injured in state territorial waters. The Death on the High Seas Act did not apply because Benny's injuries were not fatal. [9] Loss of consortium damages are not available under these circumstances under general maritime law.

[10] Neither the Supreme Court nor the Ninth Circuit has decided whether a plaintiff may recover for negligent infliction of emotional distress under the general maritime law. The Supreme Court has said that

courts should consult state common law for guidance on the issue.

[11] There is no reason to disallow meritorious emotional distress claims under the general maritime law when they are available to railroad workers under the Federal Employers Liability Act (FELA) and to plaintiffs in nearly all states. Claims for emotional distress are cognizable under admiralty law.

[12] The Supreme Court has adopted the "zone of danger" test in cases of negligent infliction of emotional distress under FELA. [13] But no theory allows recovery for emotional distress when the plaintiff was not present at the accident scene. Samantha's siblings were not physically present on the cruise with their parents. Thus, they could not state a claim for emotional distress. [14] However, Samantha was in the raft that overturned and was in the "zone of danger" at the time of the accident. The district court therefore erred in dismissing her claim for emotional distress.

COUNSEL

Donovan R. Flora, Seattle, Washington, for the plaintiffs-appellants.

Thomas F. Paul, David C. Bratz, Le Gros, Buchanan & Paul, Seattle, Washington, for the defendants-appellees.

ORDER

The opinion filed July 27, 1994, slip op. 8417, is amended as follows:

1. Slip op. at 8434, lines 9-11: Delete first sentence of the first paragraph. Replace with:

> Loss of society damages are also not recoverable under the Jones Act, or under the general maritime law, for the wrongful death of a seaman. *Miles*, 111 S. Ct. at 325.

2. Slip op. at 8434, line 15: delete "dependent" before "beneficiaries".

3. Slip op. at 8434, after citation to *Randall* in line 18, insert:

> We have also held that the beneficiaries of passengers killed or injured on *state territorial waters* can recover such damages. *Sutton v. Earles*, No. 92-55548, slip op. 5905 (9th Cir. June 3, 1994).

4. Slip op. 8434, line 25-26: delete "nor does he qualify under the definition of a longshoreman, so *Gaudet* is inapplicable." Replace with: "nor was he injured in state territorial waters, so *Gaudet* is inapplicable."

5. Slip op. at 8435: delete all of the second paragraph except the final line, which reads: "For these reasons, we affirm the district court's dismissal of the plaintiffs' loss of consortium claims." Append this sentence to the end of the previous paragraph.

6. Slip op. at 8435, footnote 15: delete footnote.

With the opinion thus amended, the panel has voted unanimously to deny the petitions for rehearing. Judge Schroeder has voted to reject the suggestion for rehearing en banc, Judges Goodwin and Norris so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing are DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

GOODWIN, Circuit Judge:

Benny Chan, his wife, Victoria Chan, and their three children, including their daughter, Samantha, (collectively referred to as the "Chans"), appeal the dismissal of their damages action against Society Expeditions and Discoverer Reederei GmbH. The Chans assert personal injury and related claims against the defendants in connection with the capsizing of an inflatable raft which ferried Benny and Samantha Chan from a cruise ship to an atoll in the South Pacific, near Tahiti.

The district court held: (1) that Washington state workers compensation law barred Benny Chan's suit against his employer, Society Expeditions, Inc.; (2) that the court did not have personal jurisdiction over Discoverer Reederei, GmbH, a German corporation; and (3) that maritime law does not permit the Chans to recover damages for loss of consortium, loss of society, or emotional distress.

We have jurisdiction under 28 U.S.C. § 1291. We affirm in part and reverse in part, and remand for further proceedings.

I.

In February 1990, Benny and Victoria Chan booked passage for themselves and their daughter, Samantha, age 7, on the cruise ship, *World Discoverer.* The *World Discoverer* is operated by Discoverer Reederei, GmbH ("Discoverer Reederei" or "Discoverer"). Benny Chan's employer,

Society Expeditions, Inc., a Washington corporation which is in the business of marketing and chartering cruise ships, chartered the *World Discoverer* for the cruise at issue. Heiko Klein, a German citizen, is the sole shareholder, chairman, and president of Society Expeditions. At the time of the relevant events, Klein was also the president and sole owner of Discoverer.

The Chans boarded the *World Discoverer* in Tahiti on March 30, 1990. The next day, passengers from the ship were ferried by inflatable raft to Makatea, a coral atoll in French Polynesia that was the first stop on the day's travel itinerary. While ferrying the last group of passengers ashore, the raft turned broadside to a wave and capsized. The passengers, including Benny and Samantha Chan, were thrown into the surf. The pilot of the raft and a passenger died in the capsizing. According to the Chans' complaint, Benny Chan sustained severe brain and head injuries, as well as other physical injuries, and Samantha Chan sustained both physical and emotional injuries.

At the time of the accident, Benny Chan was a shore-based Society Expeditions employee. He worked in the company's Seattle office, and was responsible for cabin usage and cabin inventory in support of Society's reservation system. After returning to Seattle, Benny Chan filed for state workers compensation benefits. The Washington State Department of Labor & Industries approved the benefits application after concluding that Chan was injured in the course of employment.

The Chans filed this action on July 30, 1990 on behalf of themselves and as guardian ad litem for their three

children. They asserted general maritime claims based on negligence and the doctrine of seaworthiness against three defendants: 1) Society Expeditions;[1] 2) Discoverer Reederei GmbH;[2] and 3) Heiko Klein.

The district court granted Society Expeditions' motion for summary judgment, dismissing Benny Chan's claim against it on the ground that the employer was immune from tort liability under Washington state workers compensation law. The court also dismissed Benny Chan's seaworthiness claim on the ground that his complaint alleged that he was a passenger at the time of the injury, and thus, he did not qualify as a "seaman" in order to state a claim based on the doctrine of seaworthiness. The court also granted Discoverer's motion to dismiss for lack of personal jurisdiction, and dismissed all claims for loss of consortium and emotional distress. Samantha Chan's personal injury claim against Society Expeditions has been stayed pending this appeal.[3]

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[1] In January, 1992, Society Expeditions filed a voluntary petition under Chapter 11 of the U.S. Bankruptcy Code. As of July 1992, the company was proceeding with a reorganization plan.

[2] The Chans inaccurately designated Discoverer Reederei as simply, "Discoverer," in their complaint.

[3] A second complaint arising out of the Chan family's cruise aboard the *World Discoverer* was filed on March 29, 1993. This complaint was filed only against Discoverer Reederei, in personam, and the vessel, *World Discoverer*, in rem. Action on the second complaint has been stayed pending this appeal.

II.

A. BENNY CHAN'S TORT CLAIM AGAINST SOCIETY EXPEDITIONS

The district court first held that the exclusive remedy provision of the Washington state workers compensation act bars recovery in tort for the personal injuries Benny Chan sustained on the *World Discoverer* cruise. For the following reasons, this was error.

As the district court noted, a worker who accepts state workers compensation benefits for injuries is ordinarily barred from suing his employer in tort for the same injuries. *Abraham v. Department of Labor & Indus.*, 34 P.2d 457 (1934). However, this bar does not apply to a worker who has a right under federal maritime law. Rev. Code. Wash. § 51.12.100, a provision of the Washington state workers compensation law, expressly provides:

> (1) The provisions of this title shall not apply to a master or member of a crew of any vessel, *or to employers and workers for whom a right or obligation exists under the maritime laws* or federal employees' compensation act for personal injuries or death of such workers.
>
> * * *
>
> (4) In the event payments are made under this title prior to the final determination under the maritime laws or federal employees' compensation act, *such benefits shall be repaid by the worker or beneficiary if recovery is subsequently made under the maritime laws* or federal employees' compensation act.

Rev. Code. Wash. § 51.12.100 (emphasis added).

[1] The Washington Supreme Court has held that, under this statute, a worker who accepts workers compensation benefits may nonetheless sue for his injuries under federal maritime law. *Rhodes v. Department of Labor & Indus.*, 700 P.2d 729, 731 (Wash. 1985); *see also Western Boat Bldg. Co. v. O'Leary*, 198 F.2d 409, 411 (9th Cir. 1952) (holding that receipt of state workers compensation benefits cannot bar a claimant's rights under federal maritime law). Subsection 51.12.100(4) requires a worker to repay state benefits if the worker recovers damages under federal law. *E.P. Paup Co. v. Director, Office of Workers Compensation Programs*, 999 F.2d 1341, 1348 n.3 (9th Cir. 1993).

Society Expeditions contends that this statutory exception does not apply to Benny Chan because he is not a seaman, longshoreman, or harbor worker. It also argues that section 51.12.100 applies only in the case of a conflict between federal and state *no-fault* compensation remedies. Society Expeditions cites no authority to support these arguments. Nothing in the plain language of the statute limits the exception in any such way. We decline to do so here.[4]

[2] Accordingly, we assume for the purposes of this case that because Benny Chan recovered under the workers compensation system as a "worker," he remains

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[4] The district court acknowledged the maritime exemption under section 51.12.100, but found that it was inapplicable because "there is no authority to support the proposition that the [exception] applies to fault-based claims under maritime law." However, the Jones Act, 46 U.S.C. § 688, is a fault-based system, and recovery under the Jones Act surely falls within Washington's statutory exception.

a "worker" for purposes of section 51.12.100. We express no opinion whether he was injured in the scope of his employment, but the point is irrelevant on the narrow question in this case. Benny Chan has a federal maritime right to sue Society Expeditions and the operators of the vessel as a passenger, visitor, or vacationing employee on the *World Discoverer*.[5] Whether or not he is deemed to be an employee for some purposes, he still has a general claim in admiralty for negligence,[6] and adjudication of that claim is governed by federal common law. *See Kermarec v. Compagnie Generale*, 358 U.S. 625, 629 (1958); *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 203 (1st Cir. 1988).[7]

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[5] For all that appears in the record, Benny Chan was a passenger, on vacation. Mr. Chan entered into a contract of carriage with Society Expeditions and was designated in that contract as a "passenger." The entry in the ship's log describing the capsizing, identified Mr. Chan as a passenger, as distinguished from another passenger in the raft who was identified as "staff." Mr. Chan's daily attendance record at Society Expeditions indicated a "v" for vacation on March 29 and March 30, 1990.

[6] "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740.

[7] The Chans' complaint sets forth a maritime tort within the admiralty jurisdiction of the federal courts. Maritime jurisdiction is appropriate when a potential hazard to maritime commerce arises out of an activity that bears a substantial relationship to traditional maritime activity. *Sisson v. Ruby*, 497 U.S. 358, 362 (1989); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 673 (1982). An injury to a cruise ship passenger or guest caused by the capsizing of a boat or raft is a uniquely maritime injury. *See Carey v. Bahama Cruise Lines*, 864 F.2d 201, 207 n.4 (1st Cir. 1988).

B. DISCOVERER REEDEREI: PERSONAL JURISDICTION

The next issue is whether the district court erred in dismissing the Chans' case against Discoverer Reederei for lack of personal jurisdiction. Discoverer Reederei contends: (1) that the Chans failed to serve the company properly, thereby failing to establish jurisdiction over it, and (2) that assertion of personal jurisdiction would not comport with due process.

1. *Service of Process*

Discoverer Reederei first claims that it was never served at all. The corporation argues that although the Chans personally served Heiko Klein, owner and president of Discoverer Reederei, that service was in Klein's individual capacity only and thus could not effect service against his corporation. The district court denied Discoverer's motion for summary judgment for want of service. We affirm that ruling.

[3] Under the federal rules, foreign corporations may be served either (1) in accordance with the law of the state in which the district court is located, Fed. R. Civ. P. 4(d)(7), or (2) by delivering a copy of the summons and the complaint "to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." Fed. R. Civ. Pro. 4(d)(3).

The Chans personally served Heiko Klein while he was in Washington state. Klein was the president and controlling shareholder of Discoverer Reederei at the time

of service. The Chans' affidavits of service indicated that Klein was served "individually and in his corporate capacity as owner of Society Expeditions." Klein's ownership or status as a corporate officer of Discoverer Reederei could have been, but were not mentioned in the affidavit of service. Discoverer Reederei contends that this failure to name Klein as president of Discoverer Reederei renders defective the service against that entity. We find this argument unpersuasive on the narrow facts of this case.

[4] Rule 4 is a flexible rule that should be liberally construed to uphold service so long as a party receives sufficient notice of the complaint. *United Food & Commercial Workers Union, Locals 197, et al. v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984). Technical defects in a summons do not justify dismissal unless a party is able to demonstrate actual prejudice. *FDIC v. Swager*, 773 F. Supp. 1244, 1249 (D. Minn. 1991); *United Food*, 736 F.2d at 1382.

[5] The complaint served on Heiko Klein named Discoverer on its face and in the caption on the summons. Heiko Klein was the president and sole shareholder of Discoverer Reederei as well as of Society Expeditions. Discoverer Reederei has offered no evidence that it was prejudiced by the failure of the summons to describe Heiko Klein in all of his numerous capacities.[8] Thus, we

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[8] Discoverer Reederei argues that the rule allowing transient or "tag" jurisdiction was never adopted in the context of a corporation. It contends that because Heiko Klein was temporarily in Washington at the time he was served, and was not conducting any business on behalf of Discoverer Reederei, service of process therefore was ineffectual. While it is true that

hold that the Chans have complied with Rule 4(d)(3) by serving an officer of Discoverer Reederei. As discussed further below, the Chans also contend that Society Expeditions was the general agent of Discoverer Reederei in the state of Washington. If true, then service of process on Society would also have been effective against Discoverer Reederei. *See Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 424 n.20 (9th Cir. 1977). The district court correctly denied Discoverer's motion to dismiss for insufficiency of process.

2. *Personal Jurisdiction*

Discoverer Reederei also contends that even if service was sufficient, the Washington courts lacked personal jurisdiction over the German corporation on due process grounds.

Personal jurisdiction over a nonresident defendant is tested by a two-part analysis. First, the exercise of jurisdiction must satisfy the requirements of the applicable state long-arm statute. Second, the exercise of jurisdiction must comport with federal due process. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 380 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. ___, 111 S. Ct. 1522 (1991).

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a corporate defendant does not submit to jurisdiction by one of its officers voluntarily entering a state, Wright & Miller, 4 *Federal Practice & Procedure*, Civil 2d § 1066-67 (1987), this situation is not what is at issue here. We hold only that service of process on Heiko Klein is effective in this instance, not that plaintiffs generally can acquire *personal jurisdiction* over corporate defendants by serving the persons who happen to own the corporation.

The Washington Supreme Court has held that the state's long-arm statute extends jurisdiction to the limit of federal due process. *Shute*, 783 P.2d 78 (1989). We have also interpreted Washington's long-arm statute as imposing "no limitations beyond those imposed by due process." *Shute*, 897 F.2d at 380 n.2. Thus, because the long-arm statute is coextensive with the outer limits of due process, we need analyze only the second part of the test. *Pacific Atlantic Trading Co. v. M/W Main Express*, 758 F.2d 1325, 1327 (9th Cir. 1985).

Due process requires that nonresident defendants have certain minimum contacts with the forum state so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *International Shoe v. Washington*, 326 U.S. 310 (1945). Discoverer Reederei argues that it does not have the requisite "minimum contacts" with the state of Washington to support personal jurisdiction. It notes that it is a German limited liability corporation, whose offices are located only in Germany. Discoverer contends that it has no agents, officers, employees, or property in Washington and does not advertise or market products or services in Washington. Further, it argues that Society Expeditions and Discoverer maintain separate books and transact all business between them as wholly independent corporations.

In *Shute*, this court held that general jurisdiction over a foreign cruise line did not exist even though it actively sought customers in the forum state. The cruise line in *Shute* had advertised in the local media, mailed brochures and paid commissions to travel agents in Washington, conducted promotional seminars in Washington, and sold vacation cruises to residents of Washington. The cruise

line also had "no offices and no exclusive agents in Washington, it is not registered to do business there, and it pays no taxes there." *Shute*, 897 F.2d at 381.

(i) General Agent

The Chans distinguish *Shute* by asserting that Society Expeditions was acting as a general agent for Discoverer Reederei in the state of Washington. According to the Chans, Discoverer Reederei, which is in the business of operating two ships, including the *World Discoverer*, has no other business than the carriage of passengers, and the passengers were obtained, ticketed, and supplied with cabins solely through the efforts of Society Expeditions.

The Chans cite *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977), to support their argument that personal jurisdiction may exist under these circumstances. In *Wells Fargo*, the court vacated the dismissal of a defendant, Wells Fargo Express Company, A.G. ("AG"), a Liechtenstein corporation, for lack of personal jurisdiction in Nevada and remanded for further proceedings. The court said that the plaintiffs could satisfy the presence requirement if they could prove that defendant Wells Fargo Express Co., an American subsidiary of AG, over whom the court did have personal jurisdiction, was acting as AG's general agent in Nevada. *Id.* at 424.

In defining a general agent, we cited *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 121 (2d Cir. 1967):

> [A] foreign corporation is doing business in New York "in the traditional sense" when its

> New York representative provides services beyond "mere solicitation" and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services.

Wells Fargo, 556 F.2d at 423. The court in *Wells Fargo* also stated that "whether the general agent was a subsidiary of the principal or independently owned is irrelevant." *Id.*[9]

[6] We agree that whether Discoverer Reederei used Society Expeditions as its general agent in Washington is a question of fact. The district court did not reach this question. The record does not contain enough facts to decide the issue on appeal. Very little discovery had been accomplished in this case prior to the motions for dismissal, due to an automatic stay of proceedings under 11 U.S.C. § 362. The record does not reveal, for example, what percentage of Discoverer Reederei's business came from Society Expeditions, or whether Society was the only agent in the United States for the German company. We know only that Discoverer Reederei itself did not

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[9] Discoverer Reederei relies on *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), in arguing that courts cannot look to the activities of an affiliated corporation for the purpose of determining whether its parent corporation was "doing business" in a state. However, courts have permitted the imputation of contacts where the subsidiary was "either established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake itself." *Gallagher v. Mazda Motor of America, Inc.*, 781 F. Supp. 1079, 1083 (E.D. Pa. 1992); *Wells Fargo*, 556 F.2d at 422-23.

conduct marketing activities in the United States.[10] The question whether an agency relationship between Discoverer and Society existed is material to the personal jurisdiction issue. We remand for additional findings by the district court.

(ii) Forum Selection Clause

Discoverer Reederei also may have voluntarily submitted to the jurisdiction of the Washington courts through the forum selection clause contained in Benny Chan's passenger ticket. The ticket included a clause that stipulated that "all disputes" arising from the contract of carriage with Society Expeditions are to be litigated in the state of Washington "to the exclusion of the courts of any other state or country."[11] The definitions section of the contract stated that the contract bound the ship, as well as "its owner, its operator or charterer."[12] Discoverer

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[10] Discoverer Reederei argues that the record is devoid of any evidence that establishes repeated or long-term chartering of the *World Discoverer* to Society Expeditions. However, the Chans have submitted disclosure documents filed by Society Expeditions in connection with its bankruptcy proceedings in which Society admits that the company enjoyed "long-term charter arrangements" with the *World Discoverer*.

[11] This provision was included in Section 19 of the contract, entitled PLACE OF SUIT. It read: "All disputes and matters whatsoever arising under, in connection with or incident to this Ticket shall be litigated, if at all, in and before a court of proper venue located in the State of Washington, USA, to the exclusion of any other state or country."

[12] In the definitions section, the contract stated: "[T]he term "SOCIETY" includes the Ship, its owner, its operator or

Reederei admits that it is the operator of *World Discoverer.*[13] Society Expeditions was the charterer.

The district court ruled that whether Society Expeditions was authorized by Discoverer to enter into contract on Discoverer's behalf was a question of fact. However, the court held that, even assuming that Society Expeditions had the authority to bind Discoverer to the passenger ticket, the forum selection clause in it "would not provide a basis for finding that the Court has jurisdiction over Discoverer [because the] forum selection clause deals only with venue, not jurisdiction." We disagree.

Challenges to personal jurisdiction may be waived by either express or implied consent. *Heller Financial, Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1291 (7th Cir. 1989) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985)). In the commercial context, parties, for business or convenience reasons, frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction. *Heller Financial*, 883 F.2d at 1290. "Where such forum-selection provisions have been obtained through 'freely negotiated' agreements and are not 'unreasonable and unjust,' their enforcement does not offend due process." *Id.* (citing *Burger King*, 471 U.S. at 472 n.14 (internal citation omitted)).

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charterer, all affiliated companies and the sales representatives and all employees of such individuals and companies."

[13] The passenger ticket also provided that any changes in the terms of the contract must be in writing and signed by the president of Society Expeditions, who was Heiko Klein. As noted, Klein is also the president of Discoverer Reederei.

[7] In *Heller Financial*, The Seventh Circuit held that a form selection clause alone could confer personal jurisdiction. *Id.* at 1292 n.4; *see also Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 78 (9th Cir. 1987). We agree with the Seventh Circuit, and hold that the district court erred in concluding that the forum selection clause in the passenger ticket could not confer personal jurisdiction over the parties who entered into it. We remand for the district court to decide whether Society Expeditions had the authority to bind Discoverer Reederei through the contract of carriage. If so, the forum selection clause would be an additional basis for establishing personal jurisdiction over Discoverer Reederei.

C. LOSS OF CONSORTIUM

The Chans contend that the district court erred in holding that general maritime law precludes the Chans' claims for loss of consortium. As authority, the district court cited *Michel v. Total Transportation, Inc.*, 957 F.2d 186 (5th Cir. 1992). The Chans argue that *Michel* is not squarely on point because it involved a wife's claim for loss of consortium in an action brought by a *seaman* under the Jones Act, and the district court here concluded that Benny Chan was not a seaman. While we agree that *Michel* is not on point, it does not follow, however, that the court erred in barring the loss of consortium claims.

In determining whether damages are recoverable in a negligence action brought under general maritime law, this court must look for guidance to congressional enactments in the field of maritime law, Supreme Court decisions, and relevant state legislation. *Miles v. Apex Marine*

Corp., 111 S. Ct. 317, 323 (1990); *Moragne*, 398 U.S. at 408. We should also, where possible, be guided by the twin aims of maritime law: achieving uniformity in the exercise of admiralty jurisdiction and providing special solicitude to seamen. *See Moragne*, 392 U.S. at 386-88; *Sea-Land Servs., Inc., v. Gaudet*, 414 U.S. 573, 577 (1973).

Because this accident occurred on the high seas, we find instructive the remedial provisions of the Death on the High Seas Act ("DOHSA"). 46 U.S.C. § 761 *et seq.*[14] DOHSA limits recoverable damages in wrongful death suits to "pecuniary loss sustained by the persons for whose benefit the suit is brought." 46 U.S.C. § 762. This express limitation has been held to preclude recovery for nonpecuniary losses, such as loss of society or consortium, for deaths that occur on the high seas. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624 (1977); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. at 211.

Loss of society damages are also not recoverable under the Jones Act, or under the general maritime law, for the wrongful death of a seaman. *Miles*, 111 S. Ct. at 325. They are likewise unavailable in connection with the *injury* of a Jones Act seaman. *Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993). In cases involving longshoremen injured or killed on state territorial waters, however, beneficiaries can recover loss of society damages. *Gaudet*, 414 U.S. at 584 (as limited by *Miles*, 111 S. Ct. at 325); *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888, 903 (5th Cir. 1994). We have also held that the beneficiaries of passengers killed

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[14] DOHSA covers the death of any "person" caused by "wrongful act, neglect, or default occurring on the high seas." 46 U.S.C. § 761.

or injured on *state territorial waters* can recover such damages. *Sutton v. Earles*, No. 92-55548, slip op. 5905 (9th Cir. June 3, 1994). Such damages include "a broad range of mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." *Gaudet*, 414 U.S. at 585.

[8] None of the remedial schemes listed above applies to Benny Chan. He was not a seaman, so the Jones Act does not apply, nor was he injured in state territorial waters, so *Gaudet* is inapplicable. DOHSA does not apply because Benny Chan's injuries were not fatal. However, as noted above, we look to these maritime statutes for guidance in determining what remedies should be available in an admiralty case, such as this one, that falls outside the ambit of statutory maritime law. In this case, we must decide a question for which no definitive citation to federal case law has been offered or found.

[9] The Chans argue that we should allow a claim for loss of society or consortium to the dependents of a passenger *injured* in an accident at sea even though such damages are denied the dependents of a passenger *killed* at sea. This argument makes no sense. To so hold would effectively reward a tortfeasor for killing, rather than merely injuring his victim. Accordingly, we hold that loss of consortium and loss of society damages are not available in these circumstances under general maritime law. This conclusion best serves the goal of uniformity in remedies in maritime cases that the Supreme Court emphasized in *Miles*. In *Miles*, the Supreme Court sought to develop a "uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOSHA,

the Jones Act, or general maritime law." *Miles*, 498 U.S. at 32. For these reasons, we affirm the district court's dismissal of the dependent plaintiffs' loss of consortium claims.

D. EMOTIONAL DISTRESS CLAIMS

The district court also dismissed the Chans' emotional distress claims. It concluded that the mental pain and anguish of an injured party's family is not compensable in an action under general maritime law. As authority, it cited *Sea-Land Serv. v. Gaudet*, 414 U.S. 573, 585 n. 17 (1974) and *Cook v. Ross Island Sand & Gravel Co.*, 626 F.2d 746, 752 (9th Cir. 1980).

In *Gaudet*, the Supreme Court stated that damages for "mental anguish or grief" are *non*recoverable in a wrongful death claim by the family of a longshoreman, 414 U.S. at 585 n.17. Following *Gaudet*, we held in *Cook* that the general maritime law did not allow recovery for the "mental pain and suffering of a decedent's beneficiaries" caused by the decedent's loss. 626 F.2d at 749.

However, the plaintiffs assert facts that raise claims for the negligent infliction of emotional distress. The issue there is not the emotional grief caused by losing a loved one, as discussed in *Gaudet*, and which is sometimes called "survivor's grief." Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 6-33 at 372 (2d ed. 1975). Instead, at issue here is the *psychic injury* that comes from *witnessing* another being seriously injured or killed.

[10] Neither the Supreme Court nor this circuit has yet decided whether a plaintiff may recover for the negligent infliction of emotional distress under general maritime law. However, the Supreme Court in *Atchison, Topeka & Santa Fe.* [sic] *Ry. Co. v. Buell,* 480 U.S. 557, 568 (1987), left open the possibility of recovery for purely emotional injury in cases such as this one. The Supreme Court stated that courts should consult state common law for guidance in resolving the issue of recovery for emotional distress. *Id. Buell* involved a claim brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, which creates a negligence cause of action for railroad workers against their employees. The Jones Act creates the same cause of action for seamen, and incorporates by reference the FELA. Because we look to case law developed under the Jones Act in guiding the development of the general maritime law, we find the cases interpreting FELA instructive in the case at bar.

The Supreme Court recently took up the question it left open in *Buell*: whether recovery for negligent infliction of emotional distress is available under FELA. Resolving a circuit conflict, the Court in *Consolidated Rail Corp. v. Gottshall,* 62 LW 4609, 4612-13, 1994 WL 276652 (U.S. June 24, 1994), answered the question in the affirmative. Declaring that common law principles are entitled to "great weight" in the analysis of the scope of FELA, the Court cited as persuasive the fact that a claim for the negligent infliction of emotional distress "is nearly universally recognized among the States today." *Id.* at 4612, 4614. The Court also acknowledged that such a claim can be just as meritorious as one involving physical injury. "We see no reason why emotional injury should not be

held to be encompassed within [FELA's terms], especially given that 'severe emotional injuries can be just as debilitating as physical injuries.' " *Id.* at 4614.

[11] Although *Gottshall* involved a FELA claim, the Supreme Court's discussion of emotional distress claims guides us here. We see no reason to disallow meritorious emotional distress claims under the general maritime law when they are available to railroad workers under FELA and to plaintiffs in nearly all states.[15] Thus, consistent with our authority to develop the general maritime law when new situations arise that are not directly governed by congressional legislation or admiralty precedent,[16] we hold that claims for emotional distress are cognizable under admiralty law.

We next must decide the threshold standard that must be met by plaintiffs bringing claims for negligent infliction of emotional distress. As instructed by the Court in *Gottshall* and *Buell*, we look to state common law for guidance. At present, state courts have proposed or adopted three main theories limiting the recovery of damages for emotional distress. Under the most restrictive theory, the "physical injury or impact" rule, the plaintiff may recover emotional distress damages only if

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[15] Only one state, Alabama, has held that negligent infliction of emotional distress is not actionable. *See Allen v. Walker*, 569 So. 2d 350 (Ala. 1990).

[16] *See* U.S. Const. Art. III, § 2; Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 4-1, at 123 (1987) (Pursuant to its constitutional grant, "the federal courts have authority to develop a *substantive* body of *general maritime law* applicable to cases within the admiralty and maritime jurisdiction.").

he or she suffers an accompanying physical injury or contact. *See Plaisance v. Texaco, Inc.*, 937 F.2d 1004, 1009 (5th Cir. 1991), *aff'd on other grounds*, 966 F.2d 166 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 604 (1992). Under the next most restrictive theory, the "zone of danger" doctrine, the plaintiff may recover even though there is no physical contact, so long as the plaintiff (1) witnesses peril or harm to another and (2) is also threatened with physical harm as a consequence of the defendant's negligence. *Plaisance*, 966 F.2d at 168; *Nelsen v. Research Corp. of Univ. of Haw.*, 805 F. Supp. 837 (D. Hawaii 1992) (adopting rule). The zone of danger test currently is followed in 14 jurisdictions. *See Gottshall*, 62 LW 4614 & n.9 (listing states adopting rule).

The third theory, adopted by nearly half the states, including California and Washington, is the "bystander proximity" rule. The bystander proximity rule permits recovery, even if one is not in the zone of danger, provided the complainant: (1) is physically near the scene of the accident; (2) personally observes the accident; and (3) is closely related to the victim. *Dillon v. Legg*, 441 P.2d 912, 69 Cal. Rptr. 72 (Cal. 1968); *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 787 P.2d 553 (Wash. 1990).

[12] In *Gottshall*, the Supreme Court adopted the "zone of danger" test in cases for negligent infliction of emotional distress under FELA. The Court concluded that the test "best reconciles the concerns of the common law with the principles underlying our FELA jurisprudence." 62 LW at 4615. The Court reasoned that the zone of danger test, because it was less restrictive than the physical impact test, was "more consistent . . . with FELA's broad remedial goals." 62 LW at 4616. The Court also

noted that most jurisdictions have abandoned the physical impact test, although five states continue to adhere to it. 62 LW 4613.[17]

[13] After outlining these various tests, it is clear that we need not decide which test to adopt today to decide this appeal. None of these theories allows recovery for emotional distress when the plaintiff was not present at the accident scene. In this case, Zachary and Amanda were not physically present on the cruise with their parents. Thus, they cannot state a claim for emotional distress under any of the theories outlined above.

[14] However, unlike her siblings, Samantha Chan was in the raft that overturned in the surf, thrusting Benny Chan onto the rocks and killing two others. Thus, Samantha Chan clearly was in the so-called "zone of danger" at the time of the incident: She was riding in the raft and could have suffered the same fate as those who died or were seriously injured. According to the Chans' complaint, Samantha Chan also suffered some physical injury as a result of the capsizing of the raft.[18] The district

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[17] The Court majority in *Gottshall* rejected the bystander test as "inappropriate [ ] in the FELA context." 62 LW at 4616. It cited two primary reasons: (1) the test was not developed until 60 years after FELA's enactment, and "therefore lacks historical support," and (2) because the test is limited by most jurisdictions to plaintiffs who witness the severe injury or death of a close family member, "it would be a rare occurrence for a [railroad] worker" to meet the standard during the course of his employment. *Id.*

[18] The Chans' complaint alleges that Samantha Chan suffered personal injuries, including "injuries to her body and limbs; injury to her nervous system; great mental, physical and

court therefore erred in dismissing her claim for emotional distress.

We express no opinion whether Victoria Chan has a similar claim because she has failed to allege facts that might support a claim under any of the theories. Without more facts, we cannot determine whether she has stated a claim for emotional distress. *Cf. Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1283 (1st Cir. 1993). On remand, the trial court may allow amendment, if it sees fit, and further fact-finding on Victoria Chan's emotional distress claim should it survive pretrial proceedings. In the absence of full factual development and proper briefing by the parties, we decline to decide which of the three theories of recovery should be adopted under maritime law. We direct the district court to decide the issue in the first instance.

III.

In summary, we reverse the order dismissing Benny Chan's tort claim against Society Expeditions on the ground of workers compensation immunity. We affirm the district court's ruling on service of process, and vacate and remand for further proceedings to determine whether personal jurisdiction over Discoverer Reederei GmbH existed under general agency principles or under the contract of carriage. We affirm the order dismissing

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nervous distress pain and suffering." However, the appellees contend in their brief on appeal that Samantha Chan did not sustain physical injury. This is a question of fact for the fact-finder to decide and is inappropriate for summary judgment on the present record.

the claims of Benny Chan's wife and children for loss of consortium damages. We also affirm the order dismissing Zachary and Amanda Chan's claims for emotional injury. However, we reverse the district court's summary judgment dismissing Samantha Chan's emotional distress claim and we remand for further review of Victoria Chan's emotional distress claim.

The judgment of the district court is, **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED,** no party to recover costs on this appeal.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENNY CHAN; VICTORIA CHAN, individually and as husband and wife, a marital community; VICTORIA CHAN, as Guardian Ad Litem of SAMANTHA ALEXIS CHAN, ZACHARY ALEX CHAN, and AMANDA ELIZABETH CHAN, minor children, *Plaintiffs-Appellants,* v. SOCIETY EXPEDITIONS, INC., a Washington Corporation, *Defendant,* and DISCOVERER, a West German corporation; HEIKO KLEIN, a West German citizen, *Defendants-Appellees.*	No. 92-36868 D.C. No. CV-90-01055-TSZ OPINION

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted
February 1, 1994 – Seattle, Washington

Filed July 27, 1994

Before: Alfred T. Goodwin, Mary M. Schroeder, and William A. Norris, Circuit Judges.

Opinion by Judge Goodwin

SUMMARY

Workers' Compensation/Labor and Employment/Torts

The court of appeals affirmed a judgment in part, reversed in part, and vacated it in part. The court held that the exclusive remedy provisions of the Washington state workers compensation act does not bar recovery in tort for personal injuries under the federal maritime law.

Appellants Benny and Victoria Chan booked passage for themselves and their seven-year-old daughter Samantha on the *World Discoverer,* a cruise ship operated by Discoverer Reederei, GmbH, a German corporation. Benny's employer, defendant Society Expeditions, Inc., a Washington corporation, chartered *World Discoverer.* Appellee Heiko Klein, a German citizen, was the sole shareholder, chairman, and president of Society Expeditions; he was also president and sole owner of Discoverer Reederei.

While ferrying from *Discoverer* to a Polynesian island, the Chans were thrown from a raft onto the surf. Benny and Samantha suffered serious injuries. At the time of the accident, Benny was a shore-based Society Expeditions employee.

The Chans filed an action against Society Expeditions, Discoverer Reederei and Klein. They alleged general maritime claims based on negligence and the doctrine of unseaworthiness. The complaint was served on Klein in Washington state individually and in his

representative capacity. The district court denied Discoverer Reederei's summary judgment motion for want of service. The court went on to hold that because Benny had obtained Washington state workers compensation benefits for his injuries, the exclusive remedy provisions of the Washington state workers compensation act barred his recovery in tort for those injuries.

The court also ruled that it did not have personal jurisdiction over Discoverer Reederei and dismissed the Chans' case against it. In reaching this conclusion the court determined that even if Society Expeditions had authority to bind Discoverer Reederei to the Chans' passenger tickets (specifying Washington state law as governing "all disputes"), the forum selection clause on the tickets did not provide a basis for jurisdiction because it covered only venue. Lastly, the court held that the general maritime law precluded the Chans' claims for loss of consortium and emotional distress. The Chans appealed.

[1] The Washington Supreme Court has held that under the state workers compensation statute, a worker who accepts benefits can sue for his injuries under the federal maritime law. [2] Whether or not Benny is deemed to be an employee, he still had a general claim in admiralty for negligence.

[3] Under Rule 4 of the Federal Rules of Civil Procedure, foreign corporations may be served by delivering a copy of the complaint on an officer, managing or general agent, or any agent authorized to receive service of process. [4] Rule 4 should be liberally construed to uphold service so long as a party receives sufficient notice of the complaint. [5] Discoverer Reederei offered

no evidence that it was prejudiced by the failure of the summons to describe Klein in all of his capacities. The Chans complied with Rule 4 by serving an officer of Discoverer Reederei.

[6] Whether Discoverer Reederei used Society Expeditions as its general agent was a question of fact that was material to the personal jurisdiction issue. Remand was necessary for additional findings by the district court.

[7] The district court erred in concluding that the forum selection clause on the Chans' tickets could not confer personal jurisdiction over the parties who entered into it. Remand was required for the district court to decide whether Society Expeditions had the authority to bind Discoverer Reederei through the contract of carriage.

[8] None of the remedial schemes for recovery of society damages applied to Benny Chan. He was not a seaman, so the Jones Act did not apply. He was not a longshoreman whose beneficiaries could recover for his death or injury in state territorial waters. The Death on the High Seas Act did not apply because Benny's injuries were not fatal. [9] Loss of consortium damages are not available under these circumstances under general maritime law.

[10] Neither the Supreme Court nor the Ninth Circuit has decided whether a plaintiff may recover for negligent infliction of emotional distress under the general maritime law. The Supreme Court has said that courts should consult state common law for guidance on the issue.

[11] There is no reason to disallow meritorious emotional distress claims under the general maritime law when they are available to railroad workers under the Federal Employers Liability Act (FELA) and to plaintiffs in nearly all states. Claims for emotional distress are cognizable under admiralty law.

[12] The Supreme Court has adopted the "zone of danger" test in cases of negligent infliction of emotional distress under FELA. [13] But no theory allows recovery for emotional distress when the plaintiff was not present at the accident scene. Samantha's siblings were not physically present on the cruise with their parents. Thus, they could not state a claim for emotional distress. [14] However, Samantha was in the raft that overturned and was in the "zone of danger" at the time of the accident. The district court therefore erred in dismissing her claim for emotional distress.

COUNSEL

Donovan R. Flora, Seattle, Washington, for the plaintiffs-appellants.

Thomas F. Paul, David C. Bratz, Le Gros, Buchanan & Paul, Seattle, Washington, for the defendants-appellees.

OPINION

GOODWIN, Circuit Judge:

Benny Chan, his wife, Victoria Chan, and their three children, including their daughter, Samantha, (collectively referred to as the "Chans"), appeal the dismissal of

their damages action against Society Expeditions and Discoverer Reederei GmbH. The Chans assert personal injury and related claims against the defendants in connection with the capsizing of an inflatable raft which ferried Benny and Samantha Chan from a cruise ship to an atoll in the South Pacific, near Tahiti.

The district court held: (1) that Washington state workers compensation law barred Benny Chan's suit against his employer, Society Expeditions, Inc.; (2) that the court did not have personal jurisdiction over Discoverer Reederei, GmbH, a German corporation; and (3) that maritime law does not permit the Chans to recover damages for loss of consortium, loss of society, or emotional distress.

We have jurisdiction under 28 U.S.C. § 1291. We affirm in part and reverse in part, and remand for further proceedings.

I.

In February 1990, Benny and Victoria Chan booked passage for themselves and their daughter, Samantha, age 7, on the cruise ship, *World Discoverer.* The *World Discoverer* is operated by Discoverer Reederei, GmbH ("Discoverer Reederei" or "Discoverer"). Benny Chan's employer, Society Expeditions, Inc., a Washington corporation which is in the business of marketing and chartering cruise ships, chartered the *World Discoverer* for the cruise at issue. Heiko Klein, a German citizen, is the sole shareholder, chairman, and president of Society Expeditions. At the time of the relevant events, Klein was also the president and sole owner of Discoverer.

The Chans boarded the *World Discoverer* in Tahiti on March 30, 1990. The next day, passengers from the ship were ferried by inflatable raft to Makatea, a coral atoll in French Polynesia that was the first stop on the day's travel itinerary. While ferrying the last group of passengers ashore, the raft turned broadside to a wave and capsized. The passengers, including Benny and Samantha Chan, were thrown into the surf. The pilot of the raft and a passenger died in the capsizing. According to the Chans' complaint, Benny Chan sustained severe brain and head injuries, as well as other physical injuries, and Samantha Chan sustained both physical and emotional injuries.

At the time of the accident, Benny Chan was a shore-based Society Expeditions employee. He worked in the company's Seattle office, and was responsible for cabin usage and cabin inventory in support of Society's reservation system. After returning to Seattle, Benny Chan filed for state workers compensation benefits. The Washington State Department of Labor & Industries approved the benefits application after concluding that Chan was injured in the course of employment.

The Chans filed this action on July 30, 1990 on behalf of themselves and as guardian ad litem for their three children. They asserted general maritime claims based on negligence and the doctrine of seaworthiness against

three defendants: 1) Society Expeditions;[1] 2) Discoverer Reederei GmbH;[2] and 3) Heiko Klein.

The district court granted Society Expeditions' motion for summary judgment, dismissing Benny Chan's claim against it on the ground that the employer was immune from tort liability under Washington state workers compensation law. The court also dismissed Benny Chan's seaworthiness claim on the ground that his complaint alleged that he was a passenger at the time of the injury, and thus, he did not qualify as a "seaman" in order to state a claim based on the doctrine of seaworthiness. The court also granted Discoverer's motion to dismiss for lack of personal jurisdiction, and dismissed all claims for loss of consortium and emotional distress. Samantha Chan's personal injury claim against Society Expeditions has been stayed pending this appeal.[3]

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[1] In January, 1992, Society Expeditions filed a voluntary petition under Chapter 11 of the U.S. Bankruptcy Code. As of July 1992, the company was proceeding with a reorganization plan.

[2] The Chans inaccurately designated Discoverer Reederei as simply, "Discoverer," in their complaint.

[3] A second complaint arising out of the Chan family's cruise aboard the World Discoverer was filed on March 29, 1993. This complaint was filed only against Discoverer Reederei, in personam, and the vessel, *World Discoverer*, in rem. Action on the second complaint has been stayed pending this appeal.

II.

A. BENNY CHAN'S TORT CLAIM AGAINST SOCIETY EXPEDITIONS

The district court first held that the exclusive remedy provision of the Washington state workers compensation act bars recovery in tort for the personal injuries Benny Chan sustained on the *World Discoverer* cruise. For the following reasons, this was error.

As the district court noted, a worker who accepts state workers compensation benefits for injuries is ordinarily barred from suing his employer in tort for the same injuries. *Abraham v. Department of Labor & Indus.*, 34 P.2d 457 (1934). However, this bar does not apply to a worker who has a right under federal maritime law. Rev. Code. Wash. § 51.12.100, a provision of the Washington state workers compensation law, expressly provides:

> (1) The provisions of this title shall not apply to a master or member of a crew of any vessel, *or to employers and workers for whom a right or obligation exists under the maritime laws* or federal employees' compensation act for personal injuries or death of such workers.
>
> * * *
>
> (4) In the event payments are made under this title prior to the final determination under the maritime laws or federal employees' compensation act, *such benefits shall be repaid by the worker or beneficiary if recovery is subsequently made under the maritime laws* or federal employees' compensation act.

Rev. Code. Wash. § 51.12.100 (emphasis added).

[1] The Washington Supreme Court has held that, under this statute, a worker who accepts workers compensation benefits may nonetheless sue for his injuries under federal maritime law. *Rhodes v. Department of Labor & Indus.*, 700 P.2d 729, 731 (Wash. 1985); *see also Western Boat Bldg. Co. v. O'Leary*, 198 F.2d 409, 411 (9th Cir. 1952) (holding that receipt of state workers compensation benefits cannot bar a claimant's rights under federal maritime law). Subsection 51.12.100(4) requires a worker to repay state benefits if the worker recovers damages under federal law. *E.P. Paup Co. v. Director, Office of Workers Compensation Programs*, 999 F.2d 1341, 1348 n.3 (9th Cir. 1993).

Society Expeditions contends that this statutory exception does not apply to Benny Chan because he is not a seaman, longshoreman, or harbor worker. It also argues that section 51.12.100 applies only in the case of a conflict between federal and state *no-fault* compensation remedies. Society Expeditions cites no authority to support these arguments. Nothing in the plain language of the statute limits the exception in any such way. We decline to do so here.[4]

[2] Accordingly, we assume for the purposes of this case that because Benny Chan recovered under the workers compensation system as a "worker," he remains

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[4] The district court acknowledged the maritime exemption under section 51.12.100, but found that it was inapplicable because "there is no authority to support the proposition that the [exception] applies to fault-based claims under maritime law." However, the Jones Act, 46 U.S.C. § 688, is a fault-based system, and recovery under the Jones Act surely falls within Washington's statutory exception.

a "worker" for purposes of section 51.12.100. We express no opinion whether he was injured in the scope of his employment, but the point is irrelevant on the narrow question in this case. Benny Chan has a federal maritime right to sue Society Expeditions and the operators of the vessel as a passenger, visitor, or vacationing employee on the *World Discoverer*.[5] Whether or not he is deemed to be an employee for some purposes, he still has a general claim in admiralty for negligence,[6] and adjudication of that claim is governed by federal common law. *See Kermarec v. Compagnie Generale*, 358 U.S. 625, 629 (1958); *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 203 (1st Cir. 1988).[7]

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[5] For all that appears in the record, Benny Chan was a passenger, on vacation. Mr. Chan entered into a contract of carriage with Society Expeditions and was designated in that contract as a "passenger." The entry in the ship's log describing the capsizing, identified Mr. Chan as a passenger, as distinguished from another passenger in the raft who was identified as "staff." Mr. Chan's daily attendance record at Society Expeditions indicated a "v" for vacation on March 29 and March 30, 1990.

[6] "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740.

[7] The Chans' complaint sets forth a maritime tort within the admiralty jurisdiction of the federal courts. Maritime jurisdiction is appropriate when a potential hazard to maritime commerce arises out of an activity that bears a substantial relationship to traditional maritime activity. *Sisson v. Ruby*, 497 U.S. 358, 362 (1989); *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 673 (1982). An injury to a cruise ship passenger or guest caused by the capsizing of a boat or raft is a uniquely maritime injury. *See Carey v. Bahama Cruise Lines*, 864 F.2d 201, 207 n.4 (1st Cir. 1988).

B. DISCOVERER REEDEREI: PERSONAL JURISDICTION

The next issue is whether the district court erred in dismissing the Chans' case against Discoverer Reederei for lack of personal jurisdiction. Discoverer Reederei contends: (1) that the Chans failed to serve the company properly, thereby failing to establish jurisdiction over it, and (2) that assertion of personal jurisdiction would not comport with due process.

1. *Service of Process*

Discoverer Reederei first claims that it was never served at all. The corporation argues that although the Chans personally served Heiko Klein, owner and president of Discoverer Reederei, that service was in Klein's individual capacity only and thus could not effect service against his corporation. The district court denied Discoverer's motion for summary judgment for want of service. We affirm that ruling.

[3] Under the federal rules, foreign corporations may be served either (1) in accordance with the law of the state in which the district court is located, Fed. R. Civ. P. 4(d)(7), or (2) by delivering a copy of the summons and the complaint "to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." Fed. R. Civ. Pro. 4(d)(3).

The Chans personally served Heiko Klein while he was in Washington state. Klein was the president and controlling shareholder of Discoverer Reederei at the time

of service. The Chans' affidavits of service indicated that Klein was served "individually and in his corporate capacity as owner of Society Expeditions." Klein's ownership or status as a corporate officer of Discoverer Reederei could have been, but were not mentioned in the affidavit of service. Discoverer Reederei contends that this failure to name Klein as president of Discoverer Reederei renders defective the service against that entity. We find this argument unpersuasive on the narrow facts of this case.

[4] Rule 4 is a flexible rule that should be liberally construed to uphold service so long as a party receives sufficient notice of the complaint. *United Food & Commercial Workers Union, Locals 197, et al. v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984). Technical defects in a summons do not justify dismissal unless a party is able to demonstrate actual prejudice. *FDIC v. Swager*, 773 F. Supp. 1244, 1249 (D. Minn. 1991); *United Food*, 736 F.2d at 1382.

[5] The complaint served on Heiko Klein named Discoverer on its face and in the caption on the summons. Heiko Klein was the president and sole shareholder of Discoverer Reederei as well as of Society Expeditions. Discoverer Reederei has offered no evidence that it was prejudiced by the failure of the summons to describe Heiko Klein in all of his numerous capacities.[8] Thus, we

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[8] Discoverer Reederei argues that the rule allowing transient or "tag" jurisdiction was never adopted in the context of a corporation. It contends that because Heiko Klein was temporarily in Washington at the time he was served, and was not conducting any business on behalf of Discoverer Reederei, service of process therefore was ineffectual. While it is true that a

hold that the Chans have complied with Rule 4(d)(3) by serving an officer of Discoverer Reederei. As discussed further below, the Chans also contend that Society Expeditions was the general agent of Discoverer Reederei in the state of Washington. If true, then service of process on Society would also have been effective against Discoverer Reederei. *See Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 424 n.20 (9th Cir. 1977). The district court correctly denied Discoverer's motion to dismiss for insufficiency of process.

2. *Personal Jurisdiction*

Discoverer Reederei also contends that even if service was sufficient, the Washington courts lacked personal jurisdiction over the German corporation on due process grounds.

Personal jurisdiction over a nonresident defendant is tested by a two-part analysis. First, the exercise of jurisdiction must satisfy the requirements of the applicable state long-arm statute. Second, the exercise of jurisdiction must comport with federal due process. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 380 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. ___, 111 S. Ct. 1522 (1991).

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corporate defendant does not submit to jurisdiction by one of its officers voluntarily entering a state, Wright & Miller, 4 *Federal Practice & Procedure*, Civil 2d § 1066-67 (1987), this situation is not what is at issue here. We hold only that service of process on Heiko Klein is effective in this instance, not that plaintiffs generally can acquire *personal jurisdiction* over corporate defendants by serving the persons who happen to own the corporation.

The Washington Supreme Court has held that the state's long-arm statute extends jurisdiction to the limit of federal due process. *Shute,* 783 P.2d 78 (1989). We have also interpreted Washington's long-arm statute as imposing "no limitations beyond those imposed by due process." *Shute,* 897 F.2d at 380 n.2. Thus, because the long-arm statute is coextensive with the outer limits of due process, we need analyze only the second part of the test. *Pacific Atlantic Trading Co. v. M/W Main Express,* 758 F.2d 1325, 1327 (9th Cir. 1985).

Due process requires that nonresident defendants have certain minimum contacts with the forum state so that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. *International Shoe v. Washington,* 326 U.S. 310 (1945). Discoverer Reederei argues that it does not have the requisite "minimum contacts" with the state of Washington to support personal jurisdiction. It notes that it is a German limited liability corporation, whose offices are located only in Germany. Discoverer contends that it has no agents, officers, employees, or property in Washington and does not advertise or market products or services in Washington. Further, it argues that Society Expeditions and Discoverer maintain separate books and transact all business between them as wholly independent corporations.

In *Shute,* this court held that general jurisdiction over a foreign cruise line did not exist even though it actively sought customers in the forum state. The cruise line in *Shute* had advertised in the local media, mailed brochures and paid commissions to travel agents in Washington, conducted promotional seminars in Washington, and sold vacation cruises to residents of Washington. The cruise

line also had "no offices and no exclusive agents in Washington, it is not registered to do business there, and it pays no taxes there." *Shute*, 897 F.2d at 381.

(i) General Agent

The Chans distinguish *Shute* by asserting that Society Expeditions was acting as a general agent for Discoverer Reederei in the state of Washington. According to the Chans, Discoverer Reederei, which is in the business of operating two ships, including the *World Discoverer*, has no other business than the carriage of passengers, and the passengers were obtained, ticketed, and supplied with cabins solely through the efforts of Society Expeditions.

The Chans cite *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977), to support their argument that personal jurisdiction may exist under these circumstances. In *Wells Fargo*, the court vacated the dismissal of a defendant, Wells Fargo Express Company, A.G. ("AG"), a Liechtenstein corporation, for lack of personal jurisdiction in Nevada and remanded for further proceedings. The court said that the plaintiffs could satisfy the presence requirement if they could prove that defendant Wells Fargo Express Co., an American subsidiary of AG, over whom the court did have personal jurisdiction, was acting as AG's general agent in Nevada. *Id.* at 424.

In defining a general agent, we cited *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 121 (2d Cir. 1967):

> [A] foreign corporation is doing business in New York "in the traditional sense" when its

> New York representative provides services beyond "mere solicitation" and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services.

Wells Fargo, 556 F.2d at 423. The court in *Wells Fargo* also stated that "whether the general agent was a subsidiary of the principal or independently owned is irrelevant." *Id.*[9]

[6] We agree that whether Discoverer Reederei used Society Expeditions as its general agent in Washington is a question of fact. The district court did not reach this question. The record does not contain enough facts to decide the issue on appeal. Very little discovery had been accomplished in this case prior to the motions for dismissal, due to an automatic stay of proceedings under 11 U.S.C. § 362. The record does not reveal, for example, what percentage of Discoverer Reederei's business came from Society Expeditions, or whether Society was the only agent in the United States for the German company. We know only that Discoverer Reederei itself did not

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[9] Discoverer Reederei relies on *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), in arguing that courts cannot look to the activities of an affiliated corporation for the purpose of determining whether its parent corporation was "doing business" in a state. However, courts have permitted the imputation of contacts where the subsidiary was "either established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake itself." *Gallagher v. Mazda Motor of America, Inc.*, 781 F. Supp. 1079, 1083 (E.D. Pa. 1992); *Wells Fargo*, 556 F.2d at 422-23.

conduct marketing activities in the United States.[10] The question whether an agency relationship between Discoverer and Society existed is material to the personal jurisdiction issue. We remand for additional findings by the district court.

(ii) Forum Selection Clause

Discoverer Reederei also may have voluntarily submitted to the jurisdiction of the Washington courts through the forum selection clause contained in Benny Chan's passenger ticket. The ticket included a clause that stipulated that "all disputes" arising from the contract of carriage with Society Expeditions are to be litigated in the state of Washington "to the exclusion of the courts of any other state or country."[11] The definitions section of the contract stated that the contract bound the ship, as well as "its owner, its operator or charterer."[12] Discoverer

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[10] Discoverer Reederei argues that the record is devoid of any evidence that establishes repeated or long-term chartering of the *World Discoverer* to Society Expedition. However, the Chans have submitted disclosure documents filed by Society Expeditions in connection with its bankruptcy proceedings in which Society admits that the company enjoyed "long-term charter arrangements" with the *World Discoverer.*

[11] This provision was included in Section 19 of the contract, entitled PLACE OF SUIT. It read: "All disputes and matters whatsoever arising under, in connection with or incident to this Ticket shall be litigated, if at all, in and before a court of proper venue located in the State of Washington, USA, to the exclusion of any other state or country."

[12] In the definitions section, the contract stated: "[T]he term "SOCIETY" includes the Ship, its owner, its operator or

Reederei admits that it is the operator of *World Discoverer.*[13] Society Expeditions was the charterer.

The district court ruled that whether Society Expeditions was authorized by Discoverer to enter into contracts on Discoverer's behalf was a question of fact. However, the court held that, even assuming that Society Expeditions had the authority to bind Discoverer to the passenger ticket, the forum selection clause in it "would not provide a basis for finding that the Court has jurisdiction over Discoverer [because the] forum selection clause deals only with venue, not jurisdiction." We disagree.

Challenges to personal jurisdiction may be waived by either express or implied consent. *Heller Financial, Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1291 (7th Cir. 1989) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985)). In the commercial context, parties, for business or convenience reasons, frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction. *Heller Financial*, 883 F.2d at 1290. "Where such forum-selection provisions have been obtained through 'freely negotiated' agreements and are not 'unreasonable and unjust,' their enforcement does not offend due process." *Id.* (citing *Burger King*, 471 U.S. at 472 n.14 (internal citation omitted)).

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charterer, all affiliated companies and the sales representatives and all employees of such individuals and companies."

[13] The passenger ticket also provided that any changes in the terms of the contract must be in writing and signed by the president of Society Expeditions, who was Heiko Klein. As noted, Klein is also the president of Discoverer Reederei.

[7] In *Heller Financial*, the Seventh Circuit held that a forum selection clause alone could confer personal jurisdiction. *Id.* at 1292 n.4; *see also Hunt Wesson Foods, Inc. v. Supreme Oil Co.*, 817 F.2d 75, 78 (9th Cir. 1987). We agree with the Seventh Circuit, and hold that the district court erred in concluding that the forum selection clause in the passenger ticket could not confer personal jurisdiction over the parties who entered into it. We remand for the district court to decide whether Society Expeditions had the authority to bind Discoverer Reederei through the contract of carriage. If so, the forum selection clause would be an additional basis for establishing personal jurisdiction over Discoverer Reederei.

C. LOSS OF CONSORTIUM

The Chans contend that the district court erred in holding that general maritime law precludes the Chans' claims for loss of consortium. As authority, the district court cited *Michel v. Total Transportation, Inc.*, 957 F.2d 186 (5th Cir. 1992). The Chans argue that *Michel* is not squarely on point because it involved a wife's claim for loss of consortium in an action brought by a *seaman* under the Jones Act, and the district court here concluded that Benny Chan was not a seaman. While we agree that *Michel* is not on point, it does not follow, however, that the court erred in barring the loss of consortium claims.

In determining whether damages are recoverable in a negligence action brought under general maritime law, this court must look for guidance to congressional enactments in the field of maritime law, Supreme Court decisions, and relevant state legislation. *Miles v. Apex Marine*

Corp., 111 S. Ct. 317, 323 (1990); *Moragne*, 398 U.S. at 408. We should also, where possible, be guided by the twin aims of maritime law: achieving uniformity in the exercise of admiralty jurisdiction and providing special solicitude to seamen. *See Moragne*, 392 U.S. at 386-88; *Sea-Land Servs., Inc., v. Gaudet*, 414 U.S. 573, 577 (1973).

Because this accident occurred on the high seas, we find instructive the remedial provisions of the Death on the High Seas Act ("DOHSA"). 46 U.S.C. § 761 *et seq.*[14] DOHSA limits recoverable damages in wrongful death suits to "pecuniary loss sustained by the persons for whose benefit the suit is brought." 46 U.S.C. § 762. This express limitation has been held to preclude recovery for nonpecuniary losses, such as loss of society or consortium, for deaths that occur on the high seas. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624 (1977); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. at 211.

Loss of society damages are also not recoverable under a wrongful death action filed under the Jones Act, or under general admiralty law, *Miles*, 111 S. Ct. at 325. They are likewise unavailable in connection with the *injury* of a Jones Act seaman. *Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993). In cases involving longshoremen injured or killed on state territorial waters, however, dependent beneficiaries can recover loss of society damages. *Gaudet*, 414 U.S. at 584 (as limited by *Miles*, 111 S. Ct. at 325); *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888, 903 (5th Cir. 1994). Such damages include "a broad range of

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[14] DOHSA covers the death of any "person" caused by "wrongful act, neglect, or default occurring on the high seas." 46 U.S.C. § 761.

mutual benefits each family member receives from the others' continued existence, including love, affection, care, attention, companionship, comfort, and protection." *Gaudet*, 414 U.S. at 585.

[8] None of the remedial schemes listed above applies to Benny Chan. He was not a seaman, so the Jones Act does not apply, nor does he qualify under the definition of a longshoreman, so *Gaudet* is inapplicable. DOHSA does not apply because Benny Chan's injuries were not fatal. However, as noted above, we look to these maritime statutes for guidance in determining what remedies should be available in an admiralty case, such as this one, that falls outside the ambit of statutory maritime law. In this case, we must decide a question for which no definitive citation to federal case law has been offered or found.

[9] The Chans argue that we should allow a claim for loss of society or consortium to the dependents of a passenger *injured* in an accident at sea even though such damages are denied the dependents of a passenger *killed* at sea. This argument makes no sense. To so hold would effectively reward a tortfeasor for killing, rather than merely injuring his victim. Accordingly, we hold that loss of consortium and loss of society damages are not available in these circumstances under general maritime law. This conclusion best serves the goal of uniformity in remedies in maritime cases that the Supreme Court emphasized in *Miles*. In *Miles*, the Supreme Court sought to develop a "uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOSHA, the Jones Act, or general maritime law." *Miles*, 498 U.S. at 32.

The Fifth Circuit recently relied on this uniformity rationale in *Nichols v. Petroleum Helicopters*, 17 F.3d 119 (5th Cir. 1994), to hold that loss of consortium damages are *un*available in an action brought by the spouse of a *longshoreman* injured on the *high seas*. *Id.* The *Nichols* court noted that although *Gaudet* allowed the recovery of loss of consortium damages, the Supreme Court subsequently limited *Gaudet* to its facts, and it now applies "only in territorial waters, and [ ] only to longshoremen." *Id.* at 122 (citing *Miles*, 498 U.S. at 31). Because the longshoreman in *Nichols* had been injured eighty miles off the coast, *outside of territorial waters*, the Fifth Circuit ruled that his claim for loss of consortium damages failed to satisfy one of the two equally important requirements of *Gaudet*, and therefore must fail. *Id.* at 123. As noted, Benny Chan's injury also occurred on the high seas, and thus fails to satisfy one of the two requirements of *Gaudet*. In the interest of consistency as discussed in *Miles*, we hold that damages for loss of consortium are unavailable in this instance. For these reasons, we affirm the district court's dismissal of the dependent plaintiffs' loss of consortium claims.[15]

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[15] The plaintiffs cite a maritime law treatise as authority for the proposition that the general maritime law recognizes the right of a spouse to recover for loss of society. Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 4-12, at 142-43 (1987). However, had the plaintiffs checked the treatise's supplement, as they should have, they would have found the following: "Recovery for loss of society under general maritime law was changed significantly by *Miles v. Apex Marine Corp.*" *Id.* § 4-12 (1992 Supp.).

Furthermore, the case cited in the 1987 treatise for the proposition that loss of society damages are recoverable, *American*

D. EMOTIONAL DISTRESS CLAIMS

The district court also dismissed the Chans' emotional distress claims. It concluded that the mental pain and anguish of an injured party's family is not compensable in an action under general maritime law. As authority, it cited *Sea-Land Serv. v. Gaudet*, 414 U.S. 573, 585 n. 17 (1974) and *Cook v. Ross Island Sand & Gravel Co.*, 626 F.2d 746, 752 (9th Cir. 1980).

In *Gaudet*, the Supreme Court stated that damages for "mental anguish or grief" are *non*recoverable in a wrongful death claim by the family of a longshoreman. 414 U.S. at 585 n.17. Following *Gaudet*, we held in *Cook* that the general maritime law did not allow recovery for the "mental pain and suffering of a decedent's beneficiaries" caused by the decedent's loss. 626 F.2d at 749.

However, the plaintiffs assert facts that raise claims for the negligent infliction of emotional distress. The issue there is not the emotional grief caused by losing a loved one, as discussed in *Gaudet*, and which is sometimes called "survivor's grief." Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 6-33 at 372 (2d ed. 1975). Instead, at issue here is the *psychic injury* that comes from *witnessing* another being seriously injured or killed.

Export Lines, Inc. v. Alvez, 446 U.S. 274 (1980), was decided 10 years prior to *Miles* and would have been decided differently in light of *Miles*. In fact, subsequent courts have held that *Miles* effectively overruled *Alvez*. *See Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d 127, 130-31 (5th Cir. 1992). Had the plaintiffs adequately researched this issue, they would have found this information as well.

[10] Neither the Supreme Court nor this circuit has yet decided whether a plaintiff may recover for the negligent infliction of emotional distress under general maritime law. However, the Supreme Court in *Atchison, Topeka & Santa Fe.* [sic] *Ry. Co. v. Buell,* 480 U.S. 557, 568 (1987), left open the possibility of recovery for purely emotional injury in cases such as this one. The Supreme Court stated that courts should consult state common law for guidance in resolving the issue of recovery for emotional distress. *Id. Buell* involved a claim brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, which creates a negligence cause of action for railroad workers against their employees. The Jones Act creates the same cause of action for seamen, and incorporates by reference the FELA. Because we look to case law developed under the Jones Act in guiding the development of the general maritime law, we find the cases interpreting FELA instructive in the case at bar.

The Supreme Court recently took up the question it left open in *Buell:* whether recovery for negligent infliction of emotional distress is available under FELA. Resolving a circuit conflict, the Court in *Consolidated Rail Corp. v. Gottshall,* 62 LW 4609, 4612-13, 1994 WL 276652 (U.S. June 24, 1994), answered the question in the affirmative. Declaring that common law principles are entitled to "great weight" in the analysis of the scope of FELA, the Court cited as persuasive the fact that a claim for the negligent infliction of emotional distress "is nearly universally recognized among the States today." *Id.* at 4612, 4614. The Court also acknowledged that such a claim can be just as meritorious as one involving physical injury. "We see no reason why emotional injury should not be

held to be encompassed within [FELA's terms], especially given that 'severe emotional injuries can be just as debilitating as physical injuries.' " *Id.* at 4614.

[11] Although *Gottshall* involved a FELA claim, the Supreme Court's discussion of emotional distress claims guides us here. We see no reason to disallow meritorious emotional distress claims under the general maritime law when they are available to railroad workers under FELA and to plaintiffs in nearly all states.[16] Thus, consistent with our authority to develop the general maritime law when new situations arise that are not directly governed by congressional legislation or admiralty precedent,[17] we hold that claims for emotional distress are cognizable under admiralty law.

We next must decide the threshold standard that must be met by plaintiffs bringing claims for negligent infliction of emotional distress. As instructed by the Court in *Gottshall* and *Buell*, we look to state common law for guidance. At present, state courts have proposed or adopted three main theories limiting the recovery of damages for emotional distress. Under the most restrictive theory, the "physical injury or impact" rule, the plaintiff may recover emotional distress damages only if

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[16] Only one state, Alabama, has held that negligent infliction of emotional distress is not actionable. *See Allen v. Walker*, 569 So. 2d 350 (Ala. 1990).

[17] *See* U.S. Const. Art. III, § 2; Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 4-1, at 123 (1987) (Pursuant to its constitutional grant, "the federal courts have authority to develop a *substantive* body of *general maritime law* applicable to cases within the admiralty and maritime jurisdiction.").

he or she suffers an accompanying physical injury or contact. *See Plaisance v. Texaco, Inc.*, 937 F.2d 1004, 1009 (5th Cir. 1991), *aff'd on other grounds*, 966 F.2d 166 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 604 (1992). Under the next most restrictive theory, the "zone of danger" doctrine, the plaintiff may recover even though there is no physical contact, so long as the plaintiff (1) witnesses peril or harm to another and (2) is also threatened with physical harm as a consequence of the defendant's negligence. *Plaisance*, 966 F.2d at 168; *Nelsen v. Research Corp. of Univ. of Haw.*, 805 F. Supp. 837 (D. Hawaii 1992) (adopting rule). The zone of danger test currently is followed in 14 jurisdictions. *See Gottshall*, 62 LW 4614 & n.9 (listing states adopting rule).

The third theory, adopted by nearly half the states, including California and Washington, is the "bystander proximity" rule. The bystander proximity rule permits recovery, even if one is not in the zone of danger, provided the complainant: (1) is physically near the scene of the accident; (2) personally observes the accident; and (3) is closely related to the victim. *Dillon v. Legg*, 441 P.2d 912, 69 Cal. Rptr. 72 (Cal. 1968); *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 787 P.2d 553 (Wash. 1990).

[12] In *Gottshall*, the Supreme Court adopted the "zone of danger" test in cases for negligent infliction of emotional distress under FELA. The Court concluded that the test "best reconciles the concerns of the common law with the principles underlying our FELA jurisprudence." 62 LW at 4615. The Court reasoned that the zone of danger test, because it was less restrictive than the physical impact test, was "more consistent . . . with FELA's broad remedial goals." 62 LW at 4616. The Court also

noted that most jurisdictions have abandoned the physical impact test, although five states continue to adhere to it. 62 LW 4613.[18]

[13] After outlining these various tests, it is clear that we need not decide which test to adopt today to decide this appeal. None of these theories allows recovery for emotional distress when the plaintiff was not present at the accident scene. In this case, Zachary and Amanda were not physically present on the cruise with their parents. Thus, they cannot state a claim for emotional distress under any of the theories outlined above.

[14] However, unlike her siblings, Samantha Chan was in the raft that overturned in the surf, thrusting Benny Chan onto the rocks and killing two others. Thus, Samantha Chan clearly was in the so-called "zone of danger" at the time of the incident: She was riding in the raft and could have suffered the same fate as those who died or were seriously injured. According to the Chans' complaint, Samantha Chan also suffered some physical injury as a result of the capsizing of the raft.[19] The district

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[18] The Court majority in *Gottshall* rejected the bystander test as "inappropriate [ ] in the FELA context." 62 LW at 4616. It cited two primary reasons: (1) the test was not developed until 60 years after FELA's enactment, and "therefore lacks historical support," and (2) because the test is limited by most jurisdictions to plaintiffs who witness the severe injury or death of a close family member, "it would be a rare occurrence for a [railroad] worker" to meet the standard during the course of his employment. *Id.*

[19] The Chans' complaint alleges that Samantha Chan suffered personal injuries, including "injuries to her body and limbs; injury to her nervous system; great mental, physical and

court therefore erred in dismissing her claim for emotional distress.

We express no opinion whether Victoria Chan has a similar claim because she has failed to allege facts that might support a claim under any of the theories. Without more facts, we cannot determine whether she has stated a claim for emotional distress. *Cf. Ellenwood v. Exxon Shipping Co.*, 984 F.2d 1270, 1283 (1st Cir. 1993). On remand, the trial court may allow amendment, if it sees fit, and further fact-finding on Victoria Chan's emotional distress claim should it survive pretrial proceedings. In the absence of full factual development and proper briefing by the parties, we decline to decide which of the three theories of recovery should be adopted under maritime law. We direct the district court to decide the issue in the first instance.

III.

In summary, we reverse the order dismissing Benny Chan's tort claim against Society Expeditions on the ground of workers compensation immunity. We affirm the district court's ruling on service of process, and vacate and remand for further proceedings to determine whether personal jurisdiction over Discoverer Reederei GmbH existed under general agency principles or under the contract of carriage. We affirm the order dismissing

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nervous distress pain and suffering." However, the appellees contend in their brief on appeal that Samantha Chan did not sustain physical injury. This is a question of fact for the fact-finder to decide and is inappropriate for summary judgment on the present record.

the claims of Benny Chan's wife and children for loss of consortium damages. We also affirm the order dismissing Zachary and Amanda Chan's claims for emotional injury. However, we reverse the district court's summary judgment dismissing Samantha Chan's emotional distress claim and we remand for further review of Victoria Chan's emotional distress claim.

The judgment of the district court is, AFFIRMED IN PART, REVERSED IN PART, AND REMANDED, no party to recover costs on this appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BENNY CHAN and VICTORIA CHAN, individually, and as husband and wife, a marital community; et al., Plaintiffs, v. SOCIETY EXPEDITIONS, INC., a Washington corporation; et al., Defendants.	NO. C90-1055Z MINUTE ORDER (Filed Aug. 13, 1992)

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, U. S. District Judge:

The Court, having reviewed (1) defendant Discoverer Reederei GmbH's ("Discoverer's") motion to dismiss for lack of personal jurisdiction (docket no. 29), (2) defendant Society Expeditions' motion to dismiss plaintiff's cause of action for unseaworthiness (docket no. 31), (3) defendant Discoverer's motion to dismiss for insufficient service of process (docket no. 32), (4) defendant Klein's motion for partial summary judgment re: family members' loss of consortium and emotional distress claims (docket no. 35), (5) defendant Klein's motion for summary judgment of dismissal re: individual liability claim (docket no. 36), and (6) defendant Society Expeditions' motion for partial summary judgment of dismissal re: worker's compensation immunity (docket no. 39), plaintiffs' opposition to

such motions, defendants' replies, and all papers filed in support of and in opposition to defendants' motions, hereby finds and ORDERS:

(1) Defendant Discoverer's motion to dismiss for lack of personal jurisdiction (docket no. 29) is GRANTED. Plaintiff has failed to show that defendant has minimum contacts with the State of Washington or that it has purposely availed itself of the privilege of conducting activities here. *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945); *Shute v. Carnival Cruise Lines,* 863 F.2d 1437 (9th Cir. 1988), *modified,* 897 F.2d 377 (1990), *rev'd on other grounds,* 499 U.S. ___, 113 L.Ed.2d 622 (1991). Plaintiffs argue that Discoverer has submitted to the jurisdiction of this Court through the contract of carriage between Society Expeditions, "its operator and charterer, [and] all affiliated companies" and the Chans. There is a question of fact as to whether Society Expeditions was authorized by Discoverer to enter into contracts on Discoverer's behalf. Assuming Society Expeditions had the authority to bind Discoverer to the contract of carriage, and assuming further that the forum selection clause is valid and enforceable against Discoverer, the forum selection clause would not provide a basis for finding that the Court has jurisdiction over Discoverer. The forum selection clause deals only with venue, not jurisdiction.

(2) Defendant Society Expeditions' motion to dismiss plaintiff's cause of action for unseaworthiness (docket no. 31) is GRANTED. Plaintiff Benny Chan is not a "seaman" under the Jones Act and, therefore, defendants did not owe plaintiffs a duty of seaworthiness as a

matter of law. *Kemerec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959). Ordinarily, seaman status under the Jones Act is a question of fact for the jury. However, in this case plaintiffs admits that Benny Chan was a passenger aboard the ship and that he did not perform any of the ship's work. *See* Affid. of Victoria Chan (docket no. 60) at 2-3. ("Benny did not perform any work for Society Expeditions or the ship. He did not bring any work materials.") A necessary element of seaman status is that a seaman perform the work of the vessel. *McDemott International v. Wilander,* ___ U.S. ___, 112 L.Ed.2d 866, 882 (1991). A jury could not reasonably find that Mr. Chan performed the work of the vessel.

(3) Defendant Discoverer's motion to dismiss for insufficient service of process (docket no. 32) is DENIED.

(4) Defendant Klein's motion for partial summary judgment re: family members' loss of consortium and emotional distress claims (docket no. 35) is GRANTED. Damages for loss of society or consortium are not recoverable in a general maritime personal injury case. *Cf. Michael v. Total Transportation, Inc.,* 957 F.2d 186, 191 (5th Cir. 1992) (spouse of Jones Act seaman could not recover damages for loss of society). Similarly, the mental pain and anguish of injured party's family is not compensable in an action under general maritime law. *Cf. Sea-Land Services v. Gaudet,* 414 U.S. 573, 585 n. 15 (1974); *Cook v. Ross Island Sand and Gravel Co.,* 626 F.2d 746, 752 (9th Cir. 1980) (mental pain and anguish of a decedent's beneficiaries is not compensable under general maritime law).

(5) Defendant Klein's motion for summary judgment of dismissal re: individual liability claim (docket no.

36) is GRANTED. The corporate entity will be disregarded and liability assessed against shareholders in a corporation only where the shareholders intentionally used the corporation to violate or evade a duty owed to another. *Morgan v. Burks*, 93 Wn.2d 580, 585 (1980). There is no evidence of that here.

(6) Defendant Society Expeditions' motion for partial summary judgment of dismissal re: worker's compensation immunity (docket no. 39) is GRANTED. Plaintiff Benny Chan has applied for and been granted worker's compensation benefits under the Industrial Insurance Act, RCW Title 51. The Industrial Insurance Act abolishes rights of action by employees against employers for personal injuries to the exclusion of every other remedy. *Shoopman v. Calvo*, 63 Wn.2d 627, 388 P.2d 559 (1964). Plaintiff Benny Chan argues that he is exempted from coverage of the Act by RCW 51.12.100, which excepts "a master or member of a crew of any vessel. . . . " The Court finds this exemption to be inapplicable to Benny Chan because he is not a "seaman" under the Jones Act and because there is no authority to support the proposition that RCW 51.12.100 applies to fault-based claims under maritime law. Plaintiff also argues that his receipt of worker's compensation benefits does not preclude him from challenging his entitlement to such benefits. The Court rejects this argument. The plaintiff is bound by the Department of Labor and Industries' determination that he was injured "in the course of employment" and thus covered by the Act, a finding which plaintiff did not appeal. *Abraham v. Department of Labor and Industries*, 178 Wn. 160, 163, 34 P.2d 457 (1934).

The Clerk of the Court is directed to send a copy of this Minute Order to all counsel of record.

Filed and entered this 13th day of August, 1992.

BRUCE RIFKIN, Clerk

By /s/ Casey Condon
Casey Condon
Deputy Clerk

UNITED STATES DISTRICT COURT
Western District of Washington

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT
OF WASHINGTON
BY DEPUTY

PARTIAL
JUDGMENT IN A CIVIL CASE

(Filed Oct. 16, 1992)

CASE NUMBER: C90-1055Z

Benny and Victoria Chan, et al.

v.

Society Expeditions, Inc., et al.

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That

Judgment is entered for dismissal of all claims asserted by any party against Discoverer Reederei GmbH and Heiko Kline.

Judgment of dismissal is also entered for all claims asserted by Benny Chan and Victoria Chan individually, and as husband and wife, a marital community, and all claims of Victoria Chan as guardian ad litem of Zachary Alex Chan and Amanda Elizabeth Chan.

No just reason appears to delay the entry of this partial judgment with respect to those parties whose claims have been fully litigated.

BRUCE RIFKIN, Clerk

October 16, 1992
Date

By /s/ Casey Condon
Casey Condon
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BENNY CHAN and **VICTORIA CHAN**, et al. Plaintiffs, v. **SOCIETY EXPEDITIONS, INC.**, et al. Defendants.	AT LAW AND IN ADMIRALTY NO. C90-1055Z ORDER DIRECTING ENTRY OF JUDGMENT (Filed Sep. 29, 1992)

On August 13, 1992, the court entered a minute order granting certain motions for summary judgment. Plaintiffs' Motion for Reconsideration was denied by minute order of September 14, 1992. These orders fully dispose of all claims as to several of the parties. All claims of plaintiffs Benny Chan and Victoria Chan, individually and as husband and wife, a marital community, have been dismissed. All claims against Discoverer Reederei GmbH, a West German corporation, and Heiko Kline, an individual West German citizen, have been dismissed. All claims by Victoria Chan as guardian ad litem of Zachary Alex Chan and Amanda Elizabeth Chan have been dismissed. The only remaining claims are those of Victoria Chan as guardian ad litem of Samantha Alexis Chan against Society Expeditions, Inc. and WORLD DISCOVER. No just reason appears to delay the entry of judgment with respect to those parties whose claims have been fully litigated.

Now, therefore, **IT IS ORDERED** that the Clerk shall enter judgment of dismissal of all claims asserted by any

party against Discoverer Reederei GmbH and Heiko Kline. The Clerk shall also enter judgment of dismissal of all claims asserted by Benny Chan and Victoria Chan, individually, and as husband and wife, a marital community, and all claims of Victoria Chan as guardian ad litem of Zachary Alex Chan and Amanda Elizabeth Chan.

The Clerk of the court is directed to send a copy of this order to all counsel of record.

FILED AND ENTERED this 5th day of October, 1992.

/s/ Thomas S. Zilly
Honorable Thomas S. Zilly
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BENNY CHAN and VICTORIA CHAN, individually, and as husband and wife, a marital community; et al., Plaintiffs, v. SOCIETY EXPEDITIONS, INC., a Washington corporation; et al., Defendants.	No. C90-1055Z MINUTE ORDER (Filed Sep. 14, 1992)

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, U. S. District Judge:

The Court, having considered the plaintiff's Motion to Reconsider Defendants' Motion to Dismiss Plaintiff's Cause of Action for Unseaworthiness, docket no. 67, plaintiffs' Motion for Reconsideration of Defendant's Motion to Dismiss for Lack of Personal Jurisdiction, docket no. 68, and plaintiffs' Motion for Reconsideration of Defendant's Motion for Partial Summary Judgment re: Worker's Compensation Immunity, docket no. 69, hereby DENIES all three of the plaintiffs' motions to reconsider.

The Clerk of the Court is directed to send a copy of this Minute Order to all counsel of record.

Filed and entered this 14th day of September, 1992.

BRUCE RIFKIN, Clerk

By /s/ Casey Condon
Casey Condon
Deputy Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 92-36868
CT/AG#: CV-90-01055-TSZ

BENNY CHAN; VICTORIA CHAN, individually, and as husbanf [sic] and wife, a marital community; VICTORIA CHAN, as Guardian Ad Litem of SAMANTHA ALEXIS CHAN, ZACHARY ALEX CHAN, and AMANDA ELIZABETH CHAN, minor children,

Plaintiffs - Appellants

v.

SOCIETY EXPEDITIONS INC, a Washington Corporation

Defendant

and

DISCOVERER, a West German Corporation; HEIKO KLEIN, a West German citizen

Defendants - Appellees

(Filed November 9, 1994,
Entered November 14, 1994)

APPEAL FROM the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART, REVERSED IN PART, AND REMANDED, no party to recover costs on this appeal.

Filed and entered July 27, 1994, Amended October 14, 1994.